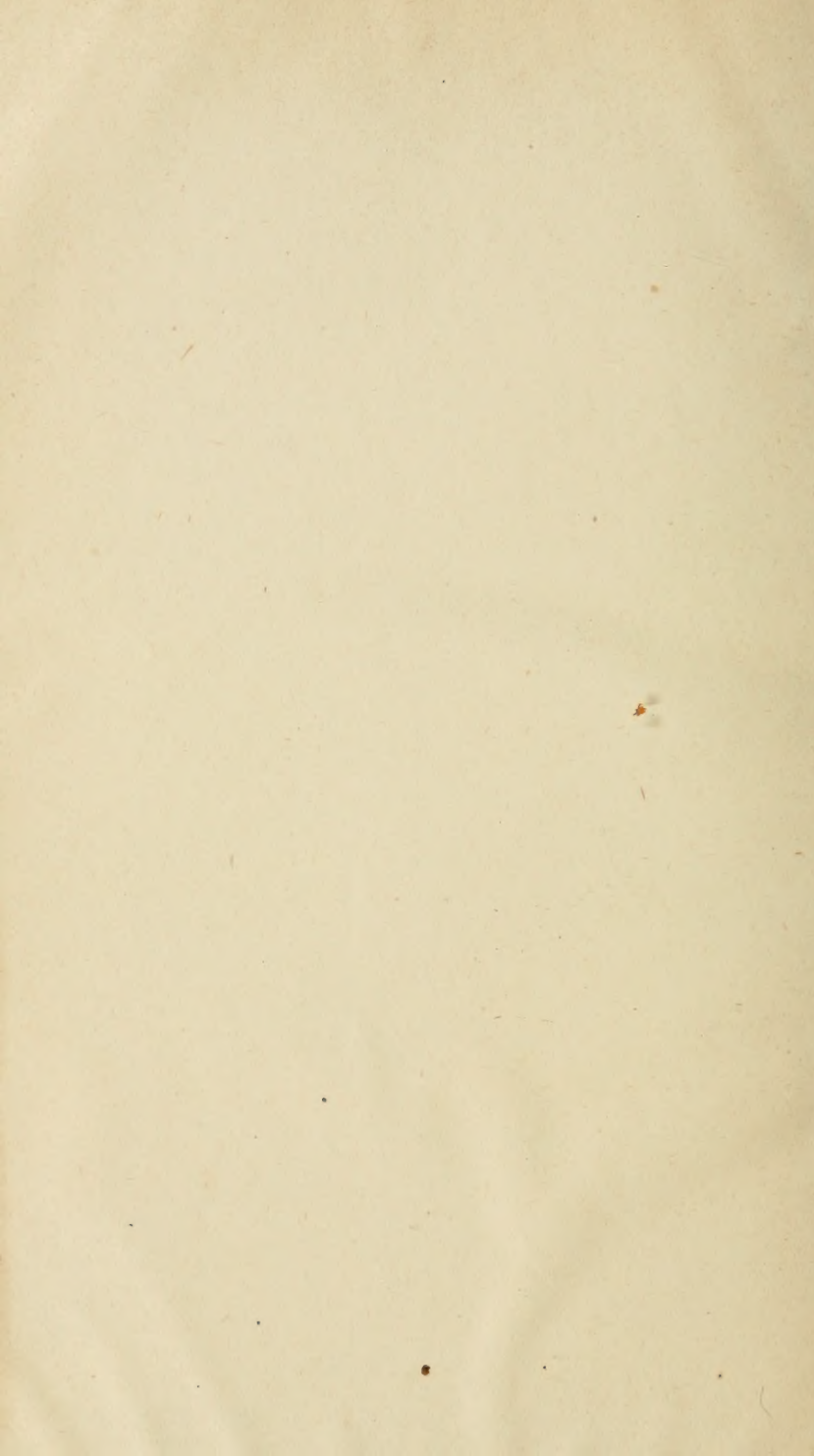


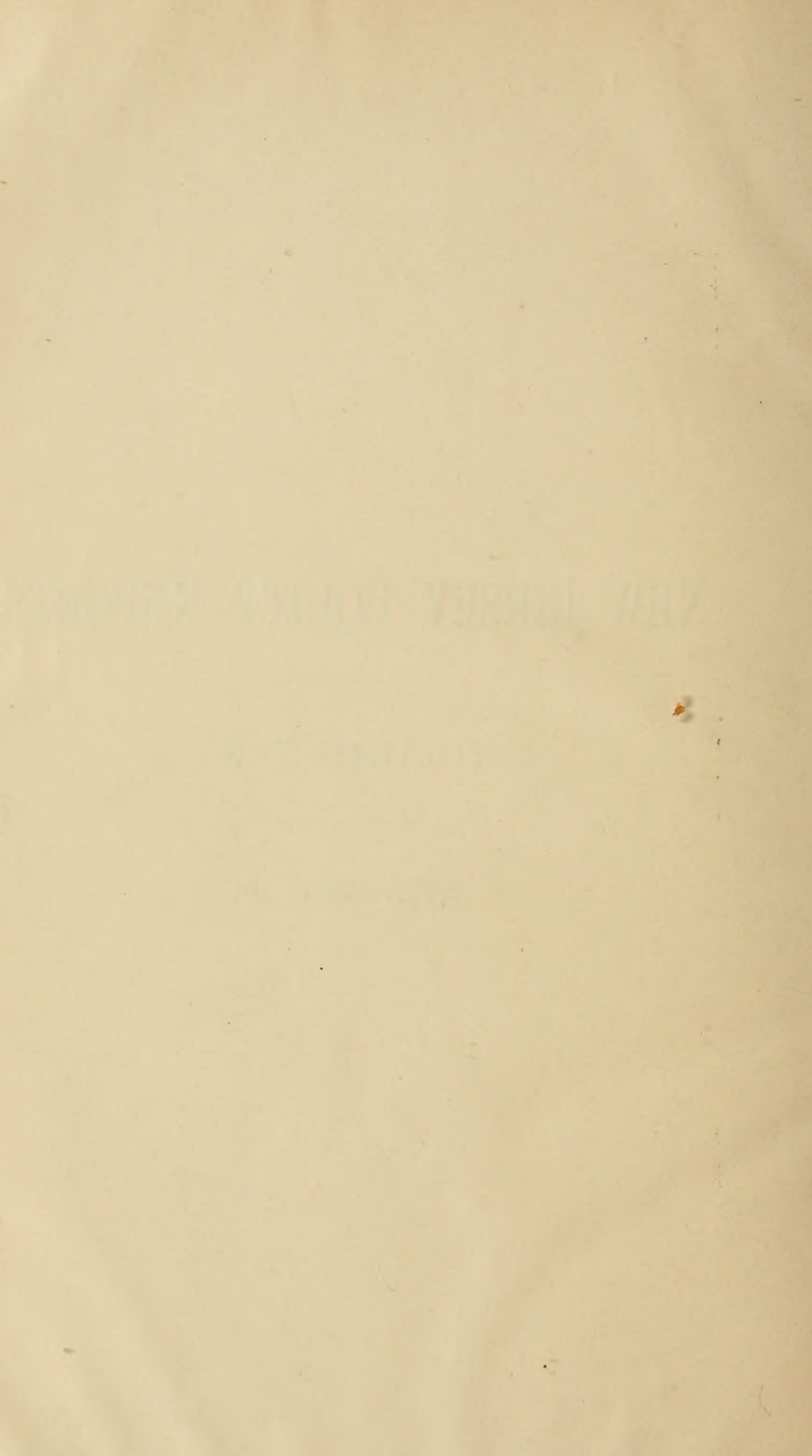




NEW JERSEY EQUITY REPORTS.

VOLUME XXX.

STEWART, 3.



REPORTS

—OF—

CASES DECIDED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

The Court of Errors and Appeals,

OF THE

STATE OF NEW JERSEY.

JOHN H. STEWART, REPORTER.

VOL. III.

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NOTE.

This volume contains the opinions delivered in the Court of Chancery and in the Prerogative Court, at October Term, 1878, and February Term, 1879, and, on appeal, in the Court of Errors and Appeals, at November Term, 1878, and March Term, 1879.

By the Chancellor's direction, the opinions in the following cases have been omitted :

October Term, 1878—*Cleary v. Roberts* ; *Shepherd v. Shepherd* ; *Smith v. Phillips* ; *Wilkinson v. Wilkinson*.

February Term, 1879—*Beers v. Beers* ; *Burtis v. Schooley* ; *Ripley v. Nagel* ; *Shouse v. Del. Rolling Mill Co.* ; *Stein v. Dunn*.

NEW JERSEY REPORTS,

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C. E. GREEN (C. E. GR.), 1863-1877, ...	12 "
STEWART (STEW.), 1877-	3 "

CASES REPORTED.

A.

Adams, Zeller v.....	421
Ahern, Esterbrook Co. v.....	341
Allaire v. Day.....	231
American Ins. Co. v. Andrew,	87
Anderson, Trustees &c. v.....	366
Andrew, American Ins. Co. v.	87
Atkinson, Budd v.....	530

B.

Barnes v. Taylor.....	7, 467
Barrows, Bergen Sav. B'k v...	89
Batty, Groton Sav. B'k v.....	126
Bell v. Romaine	23
Bellows, Wilson v.....	282
Bergen Sav. B'k v. Barrows...	89
Black v. Black	215, 228
Blair, Hardenburgh v.....	42, 645
Blake, Cushing v.....	689
Blaker v. Erie R. R.....	240
Bodine, Cook v.....	470
Bolton v. Stretch	536
Bonn, Grassmann v.....	490
Bower v. Hadden Blue Stone Co.....	171
Bower, Lyon v.....	340
Boyd v. Mundorf.....	545
Brasted v. Sutton.....	462
Brown, Mut. Ben. Ins. Co. v..	193
Brown v. Easton.....	725
Brown, Nassau Bank v.....	478
Budd v. Atkinson.....	530
Bulson, Forman v.....	494
Burnet v. Burnet	595
Butler, Gardner v.....	702

C.

Cairo & Fulton R. R. v. Titus,	502
Campbell v. Campbell.....	415
Carpenter v. Smith.....	463
Chaplain, Powers v.....	17
Chapman, Cook v.....	114
Chetwood v. Coffin ..	450
Citizens Ass'n, Lyon v.....	732
Claffin v. Mess.....	211
Cleveland, O'Neil v	273
Coddington v. Idell.....	540
Coe v. N. J. Midland R. R.,	20, 440
Coffin, Chetwood v.....	450
Cole, Denton v.....	244
Conover, Stelle v.....	640
Cook v. Bodine.....	470
Cook v. Chapman.....	114
Cooke v. Watson.....	345
Coult, Hiles v.....	40
Cubberly, Glading v.....	339
Cullen, Martin v.....	426
Cushing v. Blake.....	689

D.

Danforth v. Phila. &c. R. R...	12
Danner v. Danner.....	67
Daw v. Vreeland.....	542
Dawson v. Drake.....	601, 733
Day, Allaire v.....	231
Dayton v. Moore.....	543
De Greiff v. Wilson.....	435
De Hart, Norwood v.....	412
Denton v. Cole.....	244
Denton, Kimble v.....	732
Disborough, Shaddle v	370

Drake, Dawson v.....601, 733
 Dringer, Jewett v..... 291

E.

Easton, Brown v..... 725
 Easton v. N. Y. & L. B. R. R. 236
 Embury v. Klemm..... 517
 Emery, Slack v..... 458
 Emson, Polhemus v..... 405
 Ennis v. Hutchinson..... 110
 Erie R. R., Palys v..... 604
 Errickson v. Fields..... 634
 Esterbrook Co. v. Ahern..... 341

F.

Farmers Bank v. Lloyd..... 442
 Farrell v. Richards..... 511
 Fields, Errickson v..... 634
 Fitzgerald's Case..... 59
 Fitzpatrick, Jersey City v..... 97
 Flaacke v. Jersey City..... 733
 Flannelly, Rowley v..... 612
 Forman v. Bulson..... 494
 Fox, Williamson v..... 488
 Francis, Howard v..... 444
 Freeholders &c. v. State Bank. 311

G.

Gale v. Morris..... 285
 Gardner v. Butler..... 702
 Geer, Ransom v..... 249
 Gibbons v. Potter..... 204
 Glading v. Cubberly..... 339
 Grassmann v. Bonn..... 490
 Green v. Green..... 451
 Groton Sav. Bank v. Batty.... 126

H.

Hadden Co., Bower v..... 171
 Haggerty v. Lanterman..... 37
 Hamil, Prall v..... 557
 Hardenburgh v. Blair.....42, 645
 Heid v. Vreeland..... 591
 Helmstaedter, Johnson v..... 124
 Hiles v. Coult..... 40
 Hilton, Stilt v..... 579
 Howard v. Francis..... 444

Howell v. Shurts..... 418
 Hutchinson, Ennis v..... 110

I.

Idell, Coddington v..... 540

J.

Jersey City v. Fitzpatrick..... 97
 Jersey City, Flaacke v..... 733
 Jersey City, Lembeck v..... 554
 Jewett v. Dringer..... 291
 Johnson v. Helmstaedter..... 124

K.

Kimble v. Denton..... 732
 Kipp v. Merselis 99
 Kitchen, Ward v..... 30
 Klemm, Embury v..... 517

L.

Lanterman, Haggerty v..... 37
 Lee v. Stiger. 610
 Lehigh &c. R. R. v. McFarlan.....135, 180
 Lehigh &c. R. R. v. Society &c..... 145
 Lembeck v. Jersey City..... 554
 Leveridge v. Marsh..... 59
 Lloyd, Farmers Bank v..... 442
 Locker v. Riley..... 104
 Lott, Bowlby v..... 1
 Lyon v. Bower..... 340
 Lyon v. Citizens Association.. 732

M.

McFarlan, Lehigh &c. R. R. v.....135, 180
 McKinney, Wills v..... 465
 Manning v. Tuthill..... 28
 Marsh, Leveridge v..... 59
 Martin v. Cullen..... 426
 Mayer v. Mayer. 411
 Merselis, Kipp v..... 99
 Mess, Claflin v..... 211
 Miller v. Sauerbier..... 71
 Montague, Pasman v..... 385
 Montclair R. R., Walker v.... 525

Moore, Dayton v.....	543
Morgan, Sutton v.....	629
Morris, Gale v.....	285
Morris Canal, Society &c. v....	145
Mundorf, Boyd v.....	545
Murphy, Nat. Trust Co. v.....	408
Mut. Ben. Ins. Co. v. Brown..	193

N.

Nassau Bank v. Brown.....	478
Nat. Trust Co. v. Murphy.....	408
N. J. Midland Co., Blaker v...	240
N. J. Midland Co., Coe v...20,	440
N. J. West Line, Trustees &c. v.....	494
N. Y. & L. B. R. R., Easton v...	236
Norwood v. De Hart.....	412

O.

Ogden v. Thornton.....	569
O'Neil v. Cleveland.....	273
O'Neill v. O'Neill.....	119

P.

Palys v. Erie R. R.....	604
Partridge, Perkins v.....82,	559
Pasman v. Montague.....	385
Perkins v. Partridge.....82,	559
Perry, Vanderbeck v...	78
Phila. &c. R. R., Danforth v.	12
Pine v. Shannon.....404,	501
Polhemus v. Emson.....	405
Porter v. Trall.....	106
Potter, Gibbons v.....	204
Powers v. Chaplain.....	17
Prall v. Hamil.....	557
Probasco v. Probasco... 61, 63,	108
Provident Sav. Inst. Case.....	5

R.

Rafferty, Todd v.	254
Randall v. Vroom.....	353
Ransom v. Geer.....	249
Receivers &c., Blaker v.	240
Richards, Farrell v.....	511
Riley, Locker v.....	104

Roberts, Thornton v.....	473
Romaine, Bell v.....	23
Rowley v. Flannelly.....	612

S.

Sauerbier, Miller v	71
Seabrook, Stout v.....	187
Shaddle v. Disborough.....	370
Shannon, Pine v. 404,	501
Sheridan, Stevens Inst. v.....	22
Shurts v. Howell.	418
Slack v. Emery.....	458
Sloan, Tooker v.....	394
Smith, Carpenter v.....	463
Smith v. Smith.....	564
Society &c., Lehigh V. R. R. v.	145
Society &c., Morris Canal v...	145
Squier v. Squier.....	627
State Bank, Freeholders &c. v.	311
Stelle v. Conover.....	640
Stevens Inst. v. Sheridan.....	22
Stiger, Lee v.....	610
Stilt v. Hilton.....	579
Stockman v. Wallis.....	449
Stout v. Seabrook.....	187
Stretch, Bolton v.....	536
Stucky v. Stucky.....	546
Sutton, Brasted v.....	462
Sutton v. Morgan	629

T.

Taylor, Barnes v. 5,	467
Taylor, Trustees &c. v. ...618,	625
Thornton, Ogden v.....	569
Thornton v. Roberts.....	473
Titus, Cairo & F. R. R. v.....	502
Titus v. Titus.....	95
Todd v. Rafferty.....	254
Tomkins, Ward v	3
Tooker v. Sloan.....	394
Trall, Porter v.....	106
Trenton, Trustees &c. v.....	669
Trustees &c. v. Anderson.....	366
Trustees &c. v. N. J. West Line.....	494
Trustees &c. v. Taylor.....618,	625

Trustees &c. v. Trenton.....	669
Tuthill v. Manning.....	28

V.

Van Arsdalen v. Van Arsdalen	359
Vandegrift v. Vandegrift.....	76
Vanderbeck v. Perry.....	78
Vanderbeck v. Vanderbeck...	265
Vreeland, Daw v.....	542
Vreeland, Heid v.....	591
Vreeland, Williams v.....	576
Vroom, Randall v.....	353

W.

Walker v. Montclair R. R.....	525
Wallis, Stockman v.....	449

Ward v. Kitchen.....	30
Ward v. Tomkins.....	3
Watson, Cooke v.....	345
Watson v. Watson Co	483, 588
Weise v. Welsh.....	431
Wells, Partridge v.....	176
Welsh, Weise v	431
Williams v. Vreeland.....	576
Williamson v. Fox.....	488
Wills v. McKinney.....	465
Wilson v. Bellows.....	282
Wilson, De Greiff v.....	435

Z.

Zeller v. Adam.	421
----------------------	-----

CASES CITED.

A.

Aberdeen R. R. v. Blakie.....	1 Macq. H. L. Cas. 461.....	722
Achland v. Braddock... ..	3 Jur. 39.....	239
Adames v. Hallet.....	L. R. (6 Eq.) 468... ..	420
Agar v. Regent's Canal Co.....	Coop. Eq. 77.....	169
Allaire v. Hartshorne... ..	1 Zab. 665.....	21
Allen v. Barkley.....	Speer's Eq. 264.....	9
Allen v. Miller.....	17 Wend. 204.....	258
Ames v. Clark.....	106 Mass. 573.....	57
Andrews v. Farnham.....	2 Stock. 91.....	182
Anonymous.....	1 Atk. 262... ..	684
Anthony v. Lapham.....	5 Pick. 178.....	515
Appleby v. Rowley.....	L. R. (8 Eq.) 137.....	696
Archbold v. Commissioners.....	2 H. of L. Cas. 440.....	393
Armstrong v. Ross.....	5 C. E. Gr. 109	574
Arnold v. Brown.....	24 Pick. 89.....	720
Arnold v. Crowder.....	81 Ill. 56.....	487
Arnold v. Foote.....	12 Wend. 330.....	515
Ashurst's Appeal.....	60 Pa. St. 290.....	711
Att'y-Gen. v. Doughty.....	2 Ves. 453.....	170
Att'y-Gen. v. Moore.....	4 C. E. Gr. 503.....	6
Att'y-Gen. v. Morris.....	2 M. & W. 159.....	681
Atwater v. Fowler.....	1 Edw. Ch. 417.....	190, 257
Ault v. Goodrich.....	4 Russ. 430.....	190
Austin v. Taylor.....	1 Eden 361.....	698

B.

Bacon v. Bonham.....	12 C. E. Gr. 209.....	666
Bacot v. Wetmore.....	2 C. E. Gr. 250.....	538
Bagwell v. Dry.....	1 P. Wms. 700.....	599
Bagshaw v. Spencer.....	1 Ves. 142.....	698, 700
Balch v. N. Y. & O. R. R.....	46 N. Y. 521.....	589
Baldwin v. Johnson.....	Sax. 441.....	352
Baldwin v. Van Vorst.....	2 Stock. 577	27
Ball v. Dunsterville.	4 T. R. 313.....	202
Ballentine v. Ballentine.....	1 Hal. Ch. 471.....	77
Ballou v. Hopkinton.....	4 Gray 324.....	162

Barber v. Barber.....	18 Ves. 286	190, 257
Barber v. Barber.....	3 Myl. & Cr. 688	654
Barnes v. Taylor.....	12 C. E. Gr. 266.....	8
Barnes v. Taylor.....	1 Stew. 625.....	8
Barnes v. Trenton Gas Co.....	12 C. E. Gr. 33.....	711
Barnet v. Day.....	3 Wash. C. C. 244.....	578
Baxter v. Troy R. R.....	41 N. Y. 61.....	241
Bayard v. Hoffman.....	4 Johns. Ch. 450	661
Beasley v. Shaw.....	6 East 208.....	158
Beatty v. Montgomery.....	6 C. E. Gr. 324.....	476
Beevor v. Partridge	11 Sim. 228.....	654
Begbie v. Begbie.....	3 Hal. Ch. 98.....	77
Belford v. Crane.....	1 C. E. Gr. 271.....	212, 236
Belknap v. Trimble.....	3 Paige 577.....	162
Belmont v. Coman.....	22 N. Y. 438.....	593
Berckmans v. Berckmans.....	1 C. E. Gr. 143.....	230
Besson v. Eveland.....	11 C. E. Gr. 468.....	532
Bird v. Davis.....	1 McCart. 467.....	489
Black v. Black.....	11 C. E. Gr. 296.....	225
Black v. Shreve.....	3 Hal. Ch. 440...	170, 251
Blackburn v. Stables.....	2 V. & B. 367.....	701
Blackler v. Webb.....	2 P. Wms. 383.....	599
Blair v. Bromley.....	5 Hare 541	258
Blaker v. N. J. Midland R. R.....	3 Stew. 240.....	605
Blanchard v. Baker.....	8 Me. 253.....	515
Bliss v. Haven.....	11 C. E. Gr. 363.....	352
Bliss v. Whitney.....	9 Allen 114.....	487
Bogert v. Elizabeth.....	12 C. E. Gr. 568.....	555
Bolles v. Wade.....	3 Gr. Ch. 458.....	93
Boston Co. v. Boston & W. Co.....	16 Pick. 512.....	162, 169
Boston Co. v. N. J. Frank. Co.....	2 Beas. 215.....	587
Boßwell v. Dillon.....	Drury 291.....	698
Bowan v. Chase.....	94 U. S. 818.....	701
Bradshaw v. Klein.....	2 Biss. 20.....	126
Bramhall v. Ferris.....	24 N. Y. 9.....	666
Brandon v. Robinson.....	18 Ves. 429.....	49
Brantingham v. Brantingham.....	1 Beas. 160.....	393
Brereton v. Gamul.....	2 Atk. 240.....	178
Brolasky v. Miller.....	1 Stock. 807.....	611
Brooks v. Adams.....	2 Wall. 70	259
Brooksbank v. Smith.....	2 Y. & C. 60.....	258
Brown v. Best	1 Wils. Ch. 172.....	158
Brown v. Bulkley.....	1 McCart. 294.....	578
Brumagim v. Chew.....	4 C. E. Gr. 337.....	239
Buchan v. Sumner	2 Barb. Ch. 165.....	417
Bull v. Titsworth	2 Stew. 73.. . . .	24

Burgin v. Giberson.....	11 C. E. Gr. 72.....	614
Butts v. Wood.....	37 N. Y. 317.....	722

C.

Cairo & F. Co. v. Titus.....	1 Stew. 269	503
Calverly v. Williams.....	1 Ves. 210.....	615
Campbell's Estate.....	7 Pa. St. 100.....	270
Campbell v. Campbell.....	4 Hal. Ch. 738.....	193
Campbell v. Foster.....	35 N. Y. 361.....	656, 666
Campbell v. Howland.....	5 C. E. Gr. 186.....	679
Campbell v. Nichols.....	4 Vr. 81.....	21
Carlisle v. Cooper.....	6 C. E. Gr. 576.....	516
Carr v. Hilton.....	Curt. 230.....	126
Carroll v. Renich.....	7 Smed. & M. 798.....	701
Central R. R. v. Moore.....	4 Zab. 831.....	244
Central R. R. v. Van Horn.....	9 Vr. 138.....	244
Chalmer v. Bradley.....	1 J. & W. 51.....	190
Chandler v. Monmouth Bank.....	1 Gr. 255.....	713
Chauncey v. Graydon.....	2 Atk. 616.....	476
Chetwood v. Coffin.....	3 Stew. 450.....	450
Church v. Ackerman	Sax. 40.....	448
Clark v. Bunn.....	3 Allen 509.....	546
Clarke v. Marriott.....	9 Gill 331.....	258
Clinton v. Hooper.....	1 Ves. 188.....	220
Close v. Close.....	10 C. E. Gr. 529	221
Clymer v. James.....	MS.....	107
Coffin v. Loper.....	10 C. E. Gr. 483.....	434
Colburn v. Richards.....	13 Mass. 420.....	515
Cole v. Anderson.....	3 Hal. 68.....	235
Coleman v. Second Ave. R. R.....	38 N. Y. 201.....	723
Coles v. Trecothick.....	9 Ves. 234.....	384
Com. v. Morrison	2 A. K. Marsh. 524.....	622
Conover v. Hobart.....	9 C. E. Gr. 120.....	611
Conover v. Wardell.....	5 C. E. Gr. 266.....	614
Conrad v. Mullison.....	9 C. E. Gr. 65.....	60
Continental Co. v. Stead.....	5 Otto 161.....	607
Cook v. Johnson.....	1 Beas. 54.....	212, 236
Cook v. Travis.....	22 Barb. 338.....	131
Cook v. Whipple.....	55 N. Y. 150.....	126
Cooke v. Watson.....	3 Stew. 345.....	487
Coppuck v. Wilson.....	3 Gr. 75.....	641
Cornish v. Bryan.....	2 Stock. 146.....	567
Cortelyou v. Hathaway.....	3 Stock. 39.....	450, 451
Courter v. Stagg.....	12 C. E. Gr. 305.....	597
Cowart v. Perrine.....	3 C. E. Gr. 457.....	257
Cox v. Corkendale.....	2 Beas. 138.....	448

Cramer v. Reford.....	2 C. E. Gr. 383.....	213
Cresswell v. Cheslyn.....	2 Eden 123.....	600
Crofton v. Ormsby.....	2 Sch. & Lef. 583.....	290
Crowell v. Hospital &c.....	12 C. E. Gr. 650...368, 414, 417, 593	
Croxall v. Shererd.....	5 Wall. 268.....	695, 697
Cummins v. Little.....	1 C. E. Gr. 48.....	500
Cunningham v. Moody.....	1 Ves. 174.....	702

D.

Dale v. McEvers.....	2 Cow. 118.....	679
D'Arcy v. Blake.....	2 Sch. & Lef. 387.....	695
Dare v. Allen.....	1 Gr. Ch. 288.....	253
Davies's Will.....	7 Jur. (N. S.) 118.....	598
Davison v. Davison.....	2 Beas. 246.....	574
Dayton v. Quigley.....	2 Stew. 77.....	441
Deas v. Thorne.....	3 Johns. 551.....	344
Decker v. Miller.....	2 Paige 150.....	251
De Graw v. Clason.....	11 Paige 136.....	57
De Groot v. McCotter.....	4 C. E. Gr. 531.....	27
Del., L. & W. R. R. v. Erie R. R.....	6 C. E. Gr. 298.....	164
Del., L. & W. R. R. v. Toffey.....	9 Vr. 530.....	244
Demarest v. Berry.....	1 C. E. Gr. 481.....	603
Den v. Morris Canal Co.....	4 Zab. 587.....	152
Den v. O'Hanlon.....	1 Zab. 582.....	684
De Vaynes v. Morris.....	1 Myl. & Cr. 213.....	344
Dewey v. Ruggles.....	10 C. E. Gr. 35.....	39
Dillett v. Kemble.....	10 C. E. Gr. 66.....	472
Disborough v. Outcalt.....	Sax. 299.....	662
Docker v. Soames.....	2 Myl. & K. 674.....	310
Dodson v. Hay.....	3 Bro. C. C. 404.....	697
Doe v. Suckermore.....	5 Ad. & El. 751.....	201, 224
Dolman v. Cook.....	1 McCart. 56.....	489, 611
Donovan v. Finn.....	Hopk. Ch. 59.....	661
Dougherty v. Dougherty.....	4 Hal. Ch. 540.....	77
Douglas v. Congreve.....	1 Keen 410.....	458
Drake v. Mount.....	4 Vr. 445.....	241, 244, 605
Dudley v. Bergen.....	8 C. E. Gr. 397.....	489
Dusenbury v. Hulbert.....	59 N. Y. 541.....	546

E.

Earl of Stamford v. Hobart.....	1 Bro. P. C. 288.....	698, 700
Easton v. N. Y. & L. B. R. R.....	11 C. E. Gr. 359.....	237, 729
Eaton v. Swansea Co.....	17 Q. B. 267.....	186
Edelin v. Edelin.....	11 Md. 420.....	219
Egerton v. Earl Brownlow.....	4 H. of L. Cas. 210.....	700
Eldridge v. Hill.....	2 Johns. Ch. 281.....	143

Embrey v. Owen.....	4 E. L. & E. 466.....	515
Emson v. Polhemus.....	1 Stew. 439.....	406
English v. English.....	12 C. E. Gr. 579.....	123, 221
Erie R. R. v. D. L. & W. R. R.....	6 C. E. Gr. 283.....	23
Evans v. Evans.....	8 C. E. Gr. 72.....	252
Everly v. Rice.....	3 Gr. Ch. 553.....	587

F.

Faikey v. Reynous.....	4 Burr. 2069.....	259
Fallon v. R. R. Co.....	1 Dill. 121.....	15
Farmer v. Russell.....	1 Bos. & Pul. 296.....	257
Farnam v. Brooks.....	9 Pick. 244.....	258
Fassett v. Smith.....	23 N. Y. 252.....	133
Fee v. Fee.....	10 Ohio 469.....	258
Feit v. Vanatta.....	6 C. E. Gr. 86.....	4
Ferraby v. Hobson.....	2 Phil. 255.....	393
Finch v. Winchester.....	1 P. Wms. 277.....	290
First Nat. Bank v. Irons.....	1 Stew. 43	75
Fisher v. Skillman.....	3 C. E. Gr. 229.....	477, 599
Flanagan v. G. W. R. R.....	L. R. (7 Eq.) 117.....	722
Follett v. Tyrer.....	14 Sim. 125.....	696, 702
Fortmann v. Goepper.....	14 Ohio St. 558.....	424
Foster's Appeal.....	74 Pa. St. 391.....	417
Foster v. Hodgson.....	19 Ves. 179	191
Frazier v. Barnum.....	4 C. E. Gr. 316.....	58, 656, 666
Freehold Ass'n v. Brown.....	2 Stew. 121.....	481
Freeholders v. Thomas.....	5 C. E. Gr. 39.....	352
Freeman v. Pope.....	L. R. (5 Ch. Ap.) 544.....	213, 236
Frost v. Koon.....	30 N. Y. 428.....	443

G.

Galway v. Fullerton.....	2 C. E. Gr. 389.....	173, 246
Gardner v. Gardner.....	5 Cush. 483.....	202
Gardner v. Schooley.....	10 C. E. Gr. 150.....	74
Gariss v. Gariss.....	2 Beas. 320.....	27
Garrett v. Mason.....	2 Brock. 185	384
Garthwaite v. Lewis.....	10 C. E. Gr. 351.....	599
Gillett v. Johnson.....	30 Conn. 180	515
Gimblett v. Purton.....	L. R. (12 Eq.) 427.....	4
Glascott v. Lang.....	2 Phil. 315	393
Glasser v. Glasser.....	1 Stew. 22.....	77
Glenn v. Humphreys.....	4 Wash. C. C. 424.....	684
Going v. Emery.....	16 Pick. 107.....	39
Gould v. Wheeler.....	1 Stew. 541.....	61
Gracie v. Sheldon.....	3 Barb. 235.....	238

Graecen v. Graecen	1 Gr. Ch. 459.....	221
Graff v. Bonnet.....	31 N. Y. 46.....	666
Graham v. Berryman.....	4 C. E. Gr. 29.....	614
Graves v. Dolphin.....	1 Sim. 66.....	51
Graydon v. Graydon.....	10 C. E. Gr. 561.....	597
Great Luxembourg R. R. v. Magnay.	25 Beav. 586.....	723
Green v. Howell.....	1 Vr. 326.....	476
Green v. Spicer.....	1 Russ. & M. 395.....	52, 654
Greenin v. Hoey.....	1 Stock. 137.....	587
Gregory v. Wilson.....	7 Vr. 320.....	261
Griscom v. Evens.....	11 Vr. 402.....	598
Gurney v. A. & G. W. R. R.....	58 N. Y. 358.....	590
Gurney v. Langlands.....	5 B. & Ald. 185.....	201, 224

H.

Hadden v. Spader.....	20 Johns. 554.....	661
Haggerty v. McCanna.....	10 C. E. Gr. 48.....	472
Hallet v. Thompson.....	5 Paige 583.....	47, 53
Halsted v. Davison.....	2 Stock. 290.....	666
Hamilton v. Cummings.....	1 Johns. Ch. 523.....	567
Hand v. Marcy.....	1 Stew. 59.....	597, 599
Hanford v. Bockee.....	5 C. E. Gr. 106.....	220
Harper v. Erie R. R.....	3 Vr. 90.....	241, 244, 605
Hart v. Ten Eyck.....	5 Johns. Ch. 108.....	308
Hartman v. Alden.....	5 Vr. 518.....	543
Haston v. Castner.....	2 Stew. 536.....	420
Hatton v. Haywood.....	L. R. (9 Ch. Ap.) 229.....	660
Hearle v. Greenbank.....	3 Atk. 695.....	696
Heater v. Van Auken.....	1 McCart. 167.....	4
Hendry v. Quinan.....	4 Hal. Ch. 534.....	443
Hennion v. Jacobus.....	12 C. E. Gr. 28.....	448
Hepburn v. Hepburn.....	2 Bradf. 74.....	448
Herbert v. Mechanics Ass'n.....	2 C. E. Gr. 497.....	95
Herndon v. Howard.....	9 Wall. 664.....	344
Hewitt v. Morris.....	1 Turn. & R. 241.....	458
Hicks v. Campbell.....	4 C. E. Gr. 183.....	284
Hill v. Filkin.....	2 P. Wms. 12.....	573
Hixson v. Lombard.....	L. R. (1 H. of L.) 324.....	393
Holmes v. Chester.....	11 C. E. Gr. 79.....	555
Honore v. Colmesnil.....	1 J. J. Marsh. 525.....	578
Hopper v. Malleson.....	1 C. E. Gr. 386.....	679
Hornor v. Webster.....	4 Vr. 406.....	219
Horry v. Glover.....	2 Hill Ch. 515.....	559
Hough v. Richardson.....	3 Story 659.....	381
Houghton v. Reynolds.....	7 Jur. 441.....	126

Houston v. Clark.....	50 N. H. 482.....	226
Hoveden v. Annesley	2 Sch. & Lef. 634.....	258
Howell v. Sebring.....	1 McCart. 84.....	182, 573
Hoy v. Bramhall.....	4 C. E. Gr. 563.....	94, 246
Hoyt v. Hoyt.....	12 C. E. Gr. 399.....	393
Hoyt v. Hoyt.....	1 Stew. 485.....	554
Hudnit v. Nash.....	1 C. E. Gr. 550.....	443, 483
Humberston v. Humberston.....	2 Vern. 737.....	700
Humble v. Shore.....	2 Mer. 362.....	599
Humphrey's Case.....	11 C. E. Gr. 513.....	633
Humphrey v. Tayleur.....	Amb. 136.....	600
Hurney v. Phillips.....	50 Pa. St. 328.....	219
Huston v. Cassedy.....	2 Beas. 228.....	725

I.

Idaho, The.....	3 Otto 586.....	309
Industrial School v. Whitehead.....	2 Beas. 290.....	676
Inhabitants &c. v. Com'rs &c.....	4 Gray 500.....	681
Inslee v. Prall.....	1 Dutch. 665.....	235
Irly v. McCrae.....	4 Desauss. 422.....	448
Irwin v. Thompson.....	4 Bibb 295.....	202

J.

Jenkins v. Fryer.....	1 Pars. 46.....	4
Jersey City v. Fitzpatrick.....	7 Vr. 120.....	97
Jervoise v. Duke of Northumberland.....	1 J. & W. 559.....	698, 701
Johns v. Norris.....	12 C. E. Gr. 485.....	352
Johnson v. Cummins.....	1 C. E. Gr. 97.....	697
Johnson v. Garrett.....	1 C. E. Gr. 31.....	284
Johnson v. Woodruff.....	4 Hal. Ch. 120.....	662
Johnson v. Woodruff.....	4 Hal. Ch. 730.....	663
Johnston v. Johnston.....	31 Pa. St. 450.....	219
Jones v. Jones.....	19 Iowa 242.....	226
Jones v. Stites.....	4 C. E. Gr. 324.....	38

K.

Kane v. Bloodgood.....	7 Johns. Ch. 90.....	179
Kaufmann v. Grieseman.....	26 Pa. St. 407.....	515
Keeler v. Keeler.....	3 Stock. 458.....	284
Keene v. Munn.....	1 C. E. Gr. 398.....	416, 461
Kellinger's Case.....	9 Paige 62.....	624, 688
Keve v. Paxton.....	11 C. E. Gr. 107.....	487
King v. Talbot.....	40 N. Y. 76.....	35
King v. Whitley.....	10 Paige 465.....	414
King v. Whitley.....	1 Hoff. Ch. 477.....	417

King v. Wilcox.....	11 Paige 594.....	213
Kirkland v. Kirkland.....	11 C. E. Gr. 276.....	60
Klapworth v. Dressler.....	2 Beas. 62.	414
Kuhl v. Martin.....	2 Stew. 586.....	573

L.

Lamb v. Lamb.....	11 Pick. 371.....	457
Lambert v. Taylor.....	4 B. & C. 138....	684
Lanning v. Lanning.....	2 C. E. Gr. 228.....	578
La Terriere v. Bulmer.....	2 Sim. 18.....	458
Lee v. Lee.....	2 Dick. 806.....	226
Lehigh C. Co. v. Central R. R.....	2 Stew. 252.....	591
Lehigh V. Co. v. McFarlan.....	3 Stew. 180.....	139
Le Neve v. Le Neve.....	1 Lead. Cas. in Eq. 35.....	290
Leonard v. Countess Sussex	2 Vern. 526.....	698, 700
Lewis v. Darling.....	16 How. 6.....	573
Lippincott v. Lippincott.....	4 C. E. Gr. 121....	39
Livett v. Wilson.....	3 Bing. 115.....	186
Locke v. Lamb	L. R. (4 Eq.) 372.....	4
Lockey v. Lockey.....	Prec. Ch. 518.....	179
Long v. Carpenter.....	5 Vr. 116.....	614
Loomis v. Tift.....	16 Barb. 541.....	420
Lord Glenorchy v. Bosville.....	Cas. temp. Talb. 3.....	700
Losey v. Simpson.....	3 Stock. 246.....	546
Loss v. Obry.....	7 C. E. Gr. 52.....	614
Lovering v. Minot	9 Cush. 151.....	457, 458
Low v. Holmes	2 C. E. Gr. 148.....	435
Lugar v. Harmar	1 Cox 49	597
Lum v. Winn	4 Desauss. 66.....	573
Lupton v. White.....	15 Ves. 432.....	307
Lush v. Wilkinson.....	5 Ves. 387.....	213
Lynch v. Utica Ins. Co.....	18 Wend. 236.....	665

M.

Mabbett v. Williams	2 Keyes 457.....	656
Macknet v. Macknet.....	9 C. E. Gr. 277.....	477
McBlair v. Gibbes.....	17 How. 232.....	259
McClane v. Shepherd	6 C. E. Gr. 76.....	179
McCulloh v. Cowher.....	5 Watts & S. 427.....	133
McDermutt v. Strong	4 Johns. Ch. 688.....	661
McGregor v. McGregor.....	35 N. Y. 221.....	251
McLenahan v. McLenahan.....	3 C. E. Gr. 101.....	416
Magdalen College Case.....	11 Co. 74.....	683
Magennis v. Parkhurst.....	3 Gr. Ch. 433.....	62
Marlatt v. Warwick.....	4 C. E. Gr. 439.....	577
Marsh v. Mitchell.....	11 C. E. Gr. 497.....	182

Marsh v. Oliver.....	1 McCart. 259.....	179
Marshman v. Conklin	6 C. E. Gr. 546.....	554
Martin v. Hawk	15 Johns. 405.....	469
Martin v. Martin.....	4 Hal. Ch. 563.....	77
Martin v. Melville.....	3 Stock. 222.....	27
Mason v. Baker.....	2 K. & J. 567.....	598
Mason v. Gosby.....	1 Woodb. & M. 342.....	381
Massey v. Parker.....	2 Myl. & K. 174.....	697
May v. Wood.....	3 Bro. C. C. 471.....	4
Mays v. Manf. Nat. Bank.....	64 Pa. St. 74.....	126
Meader v. Norton.....	11 Wall. 458.....	248
Mechanics Bank v. Bridges.....	1 Vr. 112.....	677
Melick v. Melick.....	2 C. E. Gr. 156.....	60, 284, 344
Mercer & S. R. R. v. Del. & B. R. R....	MS.....	169
Merritt v. Millard.....	4 Keyes 208	260
Merritt v. Parker.....	Coxe 460.....	515
Mersey Docks v. Cameron.....	11 H. of L. Cas. 443..	681
Metler v. Metler.....	3 C. E. Gr 270.....	567
Metropolitan Bank v. Durant.....	7 C. E. Gr. 35.....	76
Midmer v. Midmer.....	11 C. E. Gr. 299.....	554, 573
Midmer v. Midmer.....	12 C. E. Gr. 548.....	393
Miller v. Mackenzie.....	2 Stew. 291.....	58
Miller v. Miller.....	L. R. (8 Eq.) 499.....	257
Miller v. Miller.....	9 Pa. St. 74.....	515
Montesquieu v. Sandays.....	18 Ves. 302.....	393, 554
Mooers v. White.....	6 Johns. Ch. 360.....	190
Moore v. De Graw.....	1 Hal. Ch. 346.....	603
Moore v. Webster	L. R. (3 Eq.) 667.....	696
Morgan v. Morgan.....	5 Madd. 408.....	696, 702
Morris Canal Co. v. Society &c.....	1 Hal. Ch. 203..	151
Morrow v. Dows.....	1 Stew. 459...451, 620, 621, 675,	679
Mulford v. Minch.....	3 Stock. 16.....	725
Muir v. Sav. Bank.....	1 C. E. Gr. 537.....	278
Mullany v. Mullany.....	3 Gr. Ch. 16.....	695, 696, 699
Mundy v. Mundy.....	2 McCart. 290.....	636
Myres v. Myres.....	23 How. Pr. 410.....	4

N.

Nash v. Ash.....	1 Eden 375.....	259
Neate v. Duke of Marlborough	3 Myl. & Cr. 416.....	659
Nesmith v. Calvert.....	1 Woodb. & M. 34.....	126
Neves v. Scott.....	9 How. 196.....	701
Neville v. Fortescue.....	16 Sim. 333.....	36
Newark Sav. Inst. Case.....	1 Stew. 552.....	6
Newhall v. Pierce.....	5 Pick. 450.....	133

New Jersey Ex. Co. v. Nichols.....	4 Vr. 439.....	244
New Jersey R. R. v. West.....	3 Vr. 95.....	244
New Jersey Zinc Co. v. N. J. F. Co... 1	McCart. 380.....	239
New York Dry Dock Co. v. Hicks... 1	McLean 11.....	410
New York Life Ins. Co. v. Cutler.....	3 Sandf. Ch. 176.....	133
New York & L. B. R. R. v. Dennis... 11	Vr. 340.....	729
Nichols v. Aylor.....	7 Leigh 546.....	186
Nichols v. Eaton.....	1 Otto 117.....	661
Nichols v. Peak.....	1 Beas. 69.....	176
Nield v. Rudderow.....	1 Stew. 274.....	538
Nipper v. Groesbeck.....	22 Barb. 670.....	636
Normand v. Grognard.....	2 C. E. Gr. 425.....	107

O.

Osborn v. Osborn.....	2 Stew. 385.....	554
Osgood v. Franklin.....	2 Johns. Ch. 1.....	538
Otway v. Hudson.....	2 Vern. 583.....	697

P.

Page v. Page.....	2 P. Wms. 489.....	599
Parker v. Baxter.....	2 Gray 185.....	679
Parker v. Carter.....	4 Hare 400.....	696, 697
Parker v. Moore.....	10 C. E. Gr. 228.....	38
Parkinson v. Parkinson.....	2 Bradf. 79.....	448
Parsons v. Heston.....	3 Stock. 155.....	182
Peacock v. Stackford.....	3 DeG. M. & G. 73.....	598
Peake v. Ledger.....	8 Hare 313.....	251
Pelletreau v. Rathbone.....	Sax. 331.....	107
Pence v. Pence.....	2 Beas. 257.....	284
People v. Doe.....	36 Cal. 220.....	622
People v. Gilbert.....	18 Johns. 227.....	684
People v. Rosseter.....	4 Cow. 143.....	684
Petrie v. Hannay.....	3 T. R. 418.....	259
Phelps v. Clapp.....	50 Barb. 430.....	420
Phelps v. Morrison.....	9 C. E. Gr. 195.....	520
Phipps v. Ackers.....	6 Cl. & Fin. 583.....	701
Piatt v. Vattier.....	9 Pet. 405.....	190
Pickert v. Ridgefield R. R.....	10 C. E. Gr. 316.....	23
Piercy v. Roberts.....	1 Myl. & K. 4.....	52
Pine v. Shannon.....	3 Stew. 404.....	502
Pitney v. Brown.....	44 Ill. 363.....	598
Platt v. Johnson.....	15 Johns. 213.....	159
Polhemus v. Emson.....	12 C. E. Gr. 190.....	406
Polhemus v. Emson.....	1 Stew. 576.....	407
Polhemus v. Emson.....	2 Stew. 583.....	407

Pollard v. Pollard.....	1 Allen 490.....	448
Porch v. Fries.....	3 C. E. Gr. 204.....	697
Powell v. Bagg.....	8 Gray 441.....	184
Price v. Sisson.....	2 Beas. 168.....	695, 699
Price v. Webb.....	2 Hare 515.....	81
Providence Co. v. Goodyear	9 Wall. 988.....	309
Pursel v. Pursel.....	1 McCart. 514.....	568

Q.

Quinby v. Manhattan Co.....	9 C. E. Gr. 260.....	487
-----------------------------	----------------------	-----

R.

Railroad Co. v. Houston.....	5 Otto 702.....	241, 243, 609
Ray v. Bogart.....	3 Johns. Cas. 432.....	190
Rayner v. Pearsall.....	3 Johns. Ch. 578.....	190
Reade v. Livingstone.....	3 Johns. Ch. 481.....	212
Reese Co. v. Atwell.....	L. R. (7 Eq.) 346.....	420
Reilly v. Smith.....	10 C. E. Gr. 538.....	353
Richards v. Smallwood.....	1 Jac. 552.....	420
Richardson v. Golden.....	3 Wash. C. C. 109.....	578
Rider v. Mason.....	4 Sandf. Ch. 351.....	666
Ridgeway v. Underwood.....	4 Wash. C. C. 137.....	212, 236
Ridgway v. English.....	2 Zab. 409.....	566
Rieber v. Hicks.....	3 Bradf. 353.....	636
Rinehart v. Rinehart.....	2 McCart. 45.....	251
Robbins v. McKnight.....	1 Hal. Ch. 642.....	490
Robinson v. Hook.....	4 Mason 139.....	179
Robinson v. Urquhart.....	1 Beas. 515.....	351
Rochfort v. Fitzmaurice.....	2 Dru. & War. 1.....	698, 700, 701
Rockford v. Hackman.....	9 Hare 475.....	51
Rodman v. Zilley.....	Sax. 321.....	384
Rogers v. Ward.....	8 Allen 387.....	126
Ross v. Union Pac. R. R.....	1 Woolw. 26.....	15
Rowe v. White.....	1 C. E. Gr. 411.....	559
Rowland v. Sturgis.....	2 Hare 520.....	466
Runyon v. Central R. R.....	1 Dutch. 558.....	244
Rutgers v. Kingsland.....	3 Hal. Ch. 658.....	291

S.

Sackville v. Holmesdale.....	L. R. (4 H. of L.) 543.....	701
Sanborn v. Adair.....	2 Stew. 338.....	611
Sandford v. Pennington.....	2 Ves. 189.....	578
Sargent v. Ballard.....	9 Pick. 251.....	184
Sayre v. Fredericks.....	1 C. E. Gr. 205.....	358
Scott v. Ames.....	3 Stock. 261.....	587

Scott v. Gallagher.....	14 Serg. & R. 333.....	133
Shaeffer v. Chambers.....	2 Hal. Ch. 548.....	603
Shaler v. Trowbridge.....	1 Stew. 595.....	178
Shannon v. Marselis.....	Sax. 413.....	41
Sharp v. Taylor.....	2 Phil. 801.....	259
Shearer v. Shearer.....	108 Mass. 107.....	417
Shibla v. Ely.....	2 Hal. Ch. 181.....	559
Shields v. Arndt.....	3 Gr. Ch. 234.....	516
Sinclair v. Armitage.....	1 Beas. 174.....	351
Sire v. Wightman.....	10 C. E. Gr. 102.....	27
Skarf v. Soulbv.....	1 MacN. & G. 364.....	420
Skrymsher v. Northcote.....	1 Swans. 566.....	600
Smith v. Bishop.....	9 Vt. 110.....	258
Smith v. Clay.....	3 Bro. C. C. 640.....	190
Smith v. Curtis.....	5 Dutch. 345.....	477, 599
Smith v. Drake.....	8 C. E. Gr. 302.....	725
Smith v. Kuhl.....	11 C. E. Gr. 97.....	116
Smith v. Lawrence.....	11 Paige 208.....	251
Smith v. Spencer.....	3 Jur. (N. S.) 193.....	696
Snowden v. Dales.....	6 Sim. 524.....	54
Society &c. v. Morris Canal.....	Sax. 157.....	149
South v. Allen.....	5 Mod. 101.....	38
South Wales R. R. v. Wythes.....	5 DeG. M. & G. 880.....	16
Spirett v. Willows.....	3 DeG. J. & S. 302.....	213, 236
Spring v. Fisk.....	6 C. E. Gr. 175.....	27
Stanley v. Stanley.....	16 Ves. 491.....	701
Stapylton v. Scott.....	13 Ves. 425.....	615
State v. Gaffney.....	5 Vr. 131.....	681
State v. Hansom.....	7 Vr. 50.....	688
State v. Newark.....	10 Vr. 380.....	620, 676
State v. Trenton.....	11 Vr. 89.....	620, 621
Stevenson v. Black.....	Sax. 338.....	593
Stewart v. L. V. R. R.....	9 Vr. 505.....	709, 712, 721
Stillman v. White R. Co.....	3 Woodb. & M. 538.....	186
Stokes v. Tilley.....	1 Stock. 130.....	478
Stout v. Seabrook.....	3 Stew. 187.....	257
Stratton v. Allen.....	1 C. E. Gr. 229.....	711, 725
Stummvoll v. Hales.....	10 Jur. (N. S.) 716.....	598
Suffern v. Butler.....	3 C. E. Gr. 220.....	587
Sullivan v. Winthrop.....	1 Sumn. 1.....	448
Sweetapple v. Bindon.....	2 Vern. 536.....	697
Sykes v. Sykes.....	L. R. (3 Ch. Ap.) 301.....	600

T.

Tantum v. Green.....	6 C. E. Gr. 364.....	76
Tatam v. Williams.....	3 Hare 357.....	257

Taylor v. Jones.....	2 Atk. 600.....	659
Teed v. Carruthers.....	2 Y. & C. 30.....	352
Telfer v. Northern R. R.....	1 Vr. 199.....	244
Tenant v. Elliott.....	1 Bos. & Pul. 3.....	259
Tenham v. Herbert.....	2 Atk. 483.....	143
Thayer v. Torrey.....	8 Vr. 339.....	593
Thomas v. Thomas.....	2 C. E. Gr. 356.....	461
Thomas v. Thomas.....	5 C. E. Gr. 97.....	221
Thompson v. Engle.....	3 Gr. Ch. 271.....	143
Tichenor v. Dodd.....	3 Gr. Ch. 454.....	414, 593
Tiernan v. Wilson.....	6 Johns. Ch. 410.....	284
Tillinghast v. Coggeshall.....	7 R. I. 383.....	701
Tindall v. Tindall.....	9 C. E. Gr. 512.....	599
Titus v. Titus.....	11 C. E. Gr. 111.....	447, 449
Tobey v. Bristol.....	2 Story 800.....	17
Tompkins v. Tompkins.....	6 C. E. Gr. 338.....	28
Townsend v. Ward.....	27 Conn. 610.....	593
Trotter v. Hughes.....	12 N. Y. 74.....	414
Troup v. Smith.....	20 Johns. 46.....	258
Trusdell v. Jones.....	8 C. E. Gr. 554.....	21
Tylden v. Hyde.....	2 S. & S. 238.....	38
Tyler v. Wilkinson.....	4 Mason 400.....	515

U.

Uhler v. Semple.....	5 C. E. Gr. 258.....	417
Underhill v. Van Cortlandt.....	2 Johns. Ch. 339.....	578
United States v. Buford.....	3 Pet. 12.....	684
United States v. Hoar.....	2 Mason 314.....	684
United States v. Nelson.....	8 Wheat. 253.....	684

V.

Vanderbeck v. Perry.....	1 Stew. 367.....	81
Vanderveer v. Holcomb.....	2 C. E. Gr. 87.....	61
Van Dyke v. Vanderpool.....	1 McCart. 198.....	476
Van Keuren v. Central R. R.....	9 Vr. 165.....	133
Voorhees v. Woodhull.....	4 Vr. 494.....	565
Vreeland v. Vreeland.....	1 C. E. Gr. 521.....	220

W.

Wales v. Stetson.....	2 Mass. 143.....	164
Walker v. Armstrong.....	8 DeG. M. & G. 534.....	573
Walker v. Hill.....	7 C. E. Gr. 513.....	577
Ward v. Jenkins.....	10 Metc. 583.....	126
Ward v. Van Bokkelen.....	2 Paige 289.....	126
Waring v. Manchester R. R.....	7 Hare 482.....	17

Warner v. Daniels.....	1 Woodb. & M. 90....	381
Warwick v. Dawes.....	11 C. E. Gr. 548.....	611
Watson v. Murray.....	8 C. E. Gr. 257.....	260
Watts v. Ball.....	1 P. Wms. 108.....	696
Watts v. Brooks.....	3 Ves. 612.....	259
Wauters v. Van Vorst.....	1 Stew. 103.....	238
Welch v. Hale.....	Doug. 238.....	469
Weehawken Co. v. Sisson.....	2 C. E. Gr. 476.....	699
Weller v. Rolason.....	2 C. E. Gr. 13.....	291
Wells v. Ely.....	3 Stock. 172.....	665
Wentz v. De Haven.....	1 Serg. & R. 317.....	270
Wetmore v. Midmer.....	6 C. E. Gr. 240.....	538
White v. Carpenter.....	2 Paige 217.....	352
White v. Williams.....	1 Gr. Ch. 376.....	489
Whitehead v. Gibbons.....	2 Stock. 230.....	461
Whitehead v. Wilson.....	2 Stew. 396.....	39
Whitney v. Robbins.....	2 C. E. Gr. 360.....	58, 663
Wikoff v. Davis.....	3 Gr. Ch. 224.....	41
Wilcox v. Rome R. R.....	41 N. Y. 358.....	241
Wilde v. Gibson.....	1 H. of L. Cas. 605.....	393
Wilkins v. Kirkbride.....	12 C. E. Gr. 93.....	443
Williams v. Doran.....	8 C. E. Gr. 365.....	489
Williams v. Winans.....	5 C. E. Gr. 332.....	344
Williamson v. Brown.....	15 N. Y. 354.....	132, 290
Williamson v. More.....	1 Barb. 229.....	578
Williamson v. N. J. S. R. R.....	2 Stew. 311.....	487
Williamson v. Williamson.....	6 Paige 298.....	448, 457
Wilson v. Brown.....	2 Beas. 277.....	574
Wilson v. Cobb.....	1 Stew. 177.....	182
Winslow v. Goodwin.....	7 Metc. 373.....	476
Wood v. Brown.....	34 N. Y. 344.....	251
Wood v. Charing Cross R. R.....	33 Beav. 290.....	23
Wood v. Chetwood.....	12 C. E. Gr. 311.....	578
Wood v. United States.....	16 Pet. 342.....	676
Woodworth v. Bennett.....	43 N. Y. 273.....	260
Wooley v. Campbell.....	8 Vr. 169.....	309
Worcester Co. v. Worcester.....	116 Mass. 193.....	681
Wright v. Howard.....	1 S. & S. 203.....	158
Wright v. Pearson.....	1 Eden 119.....	698

Y.

Younghusband v. Gisborne.....	1 Coll. 400.....	53
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Z.

Zane v. Cawley.....	6 C. E. Gr. 130.....	614
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CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1878.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

JOSEPH BOWLBY

v.

WILLIAM LOTT and others.

Where the sheriff, in advertising a sale under foreclosure, duly stated the title of the suit, and described the premises, but added, "seized and taken as the property of W. L. *et ux. et al.*, and taken in execution at the suit of J. B." (W. L. was not the owner of the fee, but the lessee)—*Held*, that this statement did not vitiate the advertisement.

Motion to set aside order for possession.

Mr. Martin Wyckoff, for the motion.

Mr. Joseph S. Smith, *contra*.

THE CHANCELLOR.

When the bill was filed, which was on the 10th of June, 1877, the title to the mortgaged premises was in Godfrey C.

Bowlby v. Lott.

Lott, to whom the property had been conveyed by the defendant, William Lott, by deed dated on the 2d of May preceding. Both William Lott and Godfrey C. Lott are parties to the bill. The property was sold to the complainant, under the writ of *fiery facias* in this suit, on the 8th of April, 1878. After the delivery of the deed from William to Godfrey, the latter leased the property to the former, from the time of making the lease up to the time when the property should be sold by the sheriff, and since the making of that lease, Godfrey has pastured his cattle and sheep on part of the premises, under an agreement between him and William, whom he compensates for the privilege. William Petty has possession of the dwelling-house on the property. He holds under William Lott. He went into possession after the commencement of this suit. After the sale by the sheriff, the complainant took proceedings for a writ of assistance, to obtain possession of the premises, against William Petty and Godfrey C. Lott. An order for possession was regularly made therein. Application is now made to set aside that order on the ground of surprise and merits.

The respondents aver that the advertisement of the sale was insufficient because the sheriff therein stated that the premises were "seized as the property of William Lott *et ux. et al.*, and taken in execution at the suit of Joseph Bowlby."

Godfrey C. Lott denies that he has possession. When possession was demanded, by the complainant, of him, he stated substantially that he did not claim possession, and he says he does not claim it now and will not prevent the complainant from taking possession of the property if the court shall adjudge that the notice of sale was sufficient.

The advertisement of sale stated that the sale was to be made by virtue of a writ of *fiery facias* issued out of this court and directed to the sheriff. It fully and particularly described the property. The statement to which the criticism of the respondents is directed, did not vitiate the advertisement.

Ward v. Tomkins.

The order for possession must stand as against William Petty. As against Godfrey C. Lott, it should be set aside, on the ground that he did not, when the demand for possession was made upon him, claim to have possession of the premises or any part of them. His reply to the demand was, however, somewhat evasive. Under the circumstances, no costs will be awarded to him.

JOSEPH WARD and others, executors, &c. of Elias Tomkins,
deceased,

v.

ABIGAIL B. TOMKINS and others.

T. gave to the children of D. a part of his residuary estate, to be equally divided *between* them as they should respectively come to the age of twenty-one years. At the time of making the will and of T.'s death, D. had two children, but before the elder came of age another child was born, and all three are living, and the eldest has attained to majority.—*Held*, that each of the three children is entitled to an equal share, and that a contrary intention cannot be inferred from the testator's use of the preposition "between."

Bill for construction of will and for directions.

Mr. J. W. Taylor, for complainants.

THE CHANCELLOR.

Elias Tomkins, late of the city of Newark, deceased, by his will gave part of his residuary estate to the children of his son Daniel, with direction to his executors to invest it for the benefit of those children, and to divide it equally between them as they should respectively come to the age of twenty-one years. At the time when the will was made,

Ward v. Tomkins.

and at the time of the testator's death, Daniel had but two children. After the testator's death, and before the elder of those children became of age, another child was born to him, which is still living. The oldest of the children has attained the age of twenty-one years.

The question is, whether all three of the children participate in the gift, or only the two who were in existence when the testator died.

A bequest of a *corpus* or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the death of the testator, but so as (where there is no evidence of intention to the contrary) to let in children subsequently coming into existence before the period of distribution. Where, therefore, there is a postponement of the payment of the legacy until a period subsequent to the death of the testator, every person answering the description at the time fixed for the division will be entitled, though not *in esse* at the death of the testator; unless it is apparent from the will that the testator intended to limit the legacy to such of the class as would answer the description when the will took effect by his death. *Hawkins on Wills* 71, 72; *Theobald on Wills* 143; *Heater v. Van Auken*, 1 *McCart.* 167; *Feit v. Vanatta*, 6 *C. E. Gr.* 86; *Jenkins v. Fryer*, 1 *Pars.* 46, 53; *Locke v. Lamb*, *L. R.* (4 *Eq.*) 372; *Gimblett v. Purton*, *L. R.* (12 *Eq.*) 427. Words directing a division or distribution between two or more persons or objects at a future time are equivalent to a direction to pay at that time. *Jar. on Wills* 655; *May v. Wood*, 3 *Bro. C. C.* 471.

The evidence of intention to confine the gift to the two children existing at the time of the testator's death, to be drawn from the fact that in directing the distribution the testator has used the word "between," is too slight to be of any value. *Myres v. Myres*, 23 *How. Pr.* 410.

The three children are entitled to the fund in equal shares, to be paid to them as they respectively attain to their majority.

Provident Savings Institution's Case.

In the matter of the application of THE PROVIDENT INSTITUTION FOR SAVINGS, in Jersey City, for direction in regard to its trusts.

Under *P. L.* 1878, p. 393, construed in connection with *P. L.* 1876, p. 341, a savings bank cannot divide more than five per cent. per annum among its depositors, until after its surplus exceeds fifteen per cent. of its deposits.

On petition.

Mr. Peter Bentley, for the petitioner.

THE CHANCELLOR.

By the charter of the petitioner (*P. L.* 1839, p. 83,) it is provided that all the income or profit of the deposits received by it shall be divided among the depositors in just proportion, after reasonable deductions for necessary expenses. By the act "for the better security of depositors in savings banks," (*P. L.* 1878, p. 393,) it is provided that "it shall be the duty of the trustees, managers or directors of every savings bank or institution to regulate the rate of interest or dividends, not to exceed five per cent. per annum [upon the moneys deposited] therewith, in such manner that depositors shall receive, as nearly as may be, all the profits of such corporation, after deducting necessary expenses and other payments, and reserving such amount as said trustees or managers may deem expedient as a surplus."

It appears, from the petition, that the petitioner, in 1877, from its income, paid to its depositors dividends amounting to six per cent. per annum, and added to its surplus about \$24,000. It is also stated that it is able to pay from its income, after deducting expenses, a dividend at that rate for the half year ending on the 1st day of July, 1878, and retain for surplus a sum equal to one-half of the amount reserved in 1877. The amount due from it to its depositors, for moneys deposited, is about \$1,500,000. Its surplus

Provident Savings Institution's Case.

amounts to about \$170,000. It proposes to increase it to an amount equal to ten per cent. of its deposits. Being in doubt whether, in view of the above-quoted provision of the act of 1878, it can lawfully pay to its depositors a dividend of more than five per cent. per annum, it asks the direction of this court in the premises.

The petitioner has no capital stock. It was incorporated merely for the purpose of receiving the money of depositors for investment and investing it on their account. It is a mere trustee. *Newark Savings Institution Case*, 1 Stew. 552. It is entitled to the aid and direction of this court in the management of its trusts. *Att'y-Gen. v. Moore's Ex'rs*, 4 C. E. Gr. 503.

The provision of the act of 1878 above referred to is somewhat obscure. Much aid in discovering the intention and policy of the legislature in enacting it may be obtained from the thirty-second section of the act "concerning savings banks" (*P. L.* 1876, p. 341). That section provides that it shall be the duty of the managers of the corporations created under that act to regulate the rate of interest or dividends (but so, however, that it shall not exceed six per cent. per annum) upon the moneys deposited with the corporation in such manner that the depositors shall receive, as nearly as may be, all the profits of the corporation after deducting necessary expenses and reserving such amount as the managers may deem expedient as a surplus fund for the security of depositors; and the managers are thereby authorized to accumulate and hold such fund to the amount of fifteen per cent. of the deposits, to meet any contingency or loss in the business of the corporation from the depreciation of its securities or otherwise. The act further provides, that it shall be the duty of the managers of any such corporation whose surplus amounts to fifteen per cent. of its deposits, at least once in three years, to divide, equitably, the accumulation beyond such surplus of fifteen per cent. as an extra dividend to depositors in excess of the before-mentioned regular dividends.

Barnes v. Taylor.

By the provision of the fourth section of the act of 1878, the legislature intended that the interest or dividends paid to the depositors of any savings bank or savings institution should not exceed five per cent. per annum until after a surplus sufficient, in the judgment of the managers, to enable the institution to meet every contingency or loss in its business by reason of depreciation of its securities or otherwise should have been accumulated. When such surplus shall have been accumulated, the whole profits or income may be divided among the depositors, but not until then.

The petitioner ought not to pay to its depositors interest or a dividend at the rate of more than five per cent. per annum until it shall have accumulated a proper surplus. In my judgment, the surplus should be a sum not less than fifteen per cent. of the deposits.

ISAAC BARNES and others

v.

JOHN L. TAYLOR and others.

1. That a purchaser under foreclosure proceedings takes possession, by mistake, of more lands than the mortgage covers, does not render him a trustee and liable for compound interest on the sums received by him while in such possession; nor does the fact that his wife is a tenant in common with the actual owners, make him a trustee, and, as such, liable.

2. Taxes and the costs of necessary repairs by the defendant, allowed in accounting.

3. If a partition be prayed, and all the parties (all being *sui juris*) agree as to the divisibility of the premises, it may be ordered, although the master reports adversely. Lands not described in the bill, must not be included in the master's report. A survey of the premises will not be ordered unless shown to be clearly necessary. Where the master was required to report a description of the premises to be divided,

Barnes v. Taylor.

a statement that the lots are Nos., &c., giving the numbers on the map on a city atlas, without more or further description, is insufficient. He should describe them.

Bill for relief. On exceptions to master's report.

Mr. S. D. Dillaye, for complainants.

Mr. J. S. Aitkin, for defendant, J. L. Taylor.

THE CHANCELLOR.

Exceptions to the master's report were filed and brought to hearing by the complainants and by the defendant, Dr. Taylor. To consider, first, those of the complainants: The bill was filed against Dr. Taylor and his wife, to establish a trust in Dr. Taylor in favor of the complainants, in regard to land mentioned in the bill, and of which he claimed to be the owner by purchase under foreclosure proceedings, and for an account of the rents and profits thereof and a partition. The trust was not established, and all the relief prayed by the bill was denied except partition and account as to certain lands which Dr. Taylor admitted, in his answer, were not covered by either of the mortgages on which the foreclosure proceedings were based, but which he had taken into his possession on the supposition that they were part of the mortgaged premises and which he had held accordingly. He admitted that he had no title thereto, and declared his readiness to yield up the possession thereof to the complainants, at the same time asserting his wife's interest therein as a tenant in common, which was not denied. *Barnes v. Taylor*, 12 C. E. Gr. 266; S. C. on appeal, 1 Stew. 625. The master allowed interest on the amount found due from Dr. Taylor, for rents and profits on the account, only from the date of filing the bill. The complainants insist that he ought to have made annual rests, and to have charged compound interest. Clearly, there is no ground for this claim of compound interest. It is based on the allegation that

Barnes v. Taylor.

Dr. Taylor was a trustee of the property. But, as before stated, he entered into and kept possession of the property on the supposition that he was the owner of it under purchase at the foreclosure sales; and, though his wife was the owner, as tenant in common, of an interest in the property, that fact did not make him a trustee for the other tenants in common. *Allen v. Barkley, Speer's Eq.* 264. Besides, it has been established and adjudged, in this suit, that he did not hold the property in trust. He should be required to pay interest, from the end of each year, on the amount of rents and profits for which he is held accountable for that year; and the complainants should be charged with interest, in like manner, on the amount with which they are chargeable for rents.

The master was directed to allow to Dr. Taylor, in the account, as against the amounts found due to the complainants, certain costs incurred in this suit and in another brought by the same complainants, with the exception of Elizabeth Paxson, against him and his wife in this court. He has not discriminated, as he ought to have done, in the allowance. He should not, of course, charge against Elizabeth Paxson's share of the money, for which Dr. Taylor is to account, the costs of the other suit. In this connection the exceptions as to the allowances of execution fees may be disposed of. It appears that the sheriff charged for forty-two adjournments of the sale, under the execution, for costs in each suit. The complainants except to the allowance, by the master, of the sheriff's fees for these adjournments. It is alleged that a stay of proceedings, under the executions, was granted by the court of appeals until the determination of the appeals in those suits, but what its particular character was, whether it was a stay of all proceedings or only of the sale, does not appear. This exception, therefore, will not be allowed.

The exception that the master allowed "other fees and percentages which were not chargeable against the complainants," is too general and indefinite to be considered.

Barnes v. Taylor.

The complainants further except because the master did not, in the account, credit the complainants with Mrs. Taylor's share of the costs of this suit. It is obvious that this exception cannot be sustained. So, also, of the exception based on the ground that the master did not credit the complainants, in the account of rents received by them from the property, with taxes paid by them on Dr. Taylor's individual property. They are entitled, in their account of rents and profits, to an allowance for any taxes paid by them for the property held in common during the time of their possession of it.

Dr. Taylor is entitled, in his account, to an allowance of the money paid by him, while he was in exclusive possession of the property, for necessary repairs to it.

Both the complainants and the defendants except to the report, on the ground that the master has reported that the property cannot be divided without great prejudice to the owners, and they agree that it can be divided into the requisite number of shares without prejudice.

The defendants except on the ground that the master has reported that part of the property designated as "the pasture lot," which lies between the westerly line of Dark lane and the feeder, as part of the property of which William Smith died seized. The order of reference directed him to "take testimony and examine the pleadings and evidence used before the chancellor on the hearing of this cause, as to the proper description of the land and premises in the bill mentioned, and of which William Smith died seized, not covered by the Cadwallader mortgage or by the Swift mortgage." The "pasture lot" was never, as far as appears, owned by William Smith. The bill, indeed, does allege that it was owned by him. It does not allege that the complainants lay any claim to that part of that lot which is south of Dark lane. The solicitor, by whom the bill was drawn, says, in his testimony before the master, that he did not discover the fact that that part of the pasture lot was not included in the description in the bill, until after the final hearing of this cause in this court. The master was in error in includ-

ing that part of the lot in the description of the land to be partitioned. It is not embraced in this suit. The first and second exceptions of Dr. Taylor, therefore, are sustained.

The third exception has reference to the part of the "pasture lot" which is embraced in the suit, and which was not covered by the Swift mortgage. The objection is, that the master, in establishing a description of it, did so without competent evidence; that a survey of the property should have been made, and the result laid before the master as evidence. I cannot, from anything that appears, adjudge that a survey was necessary. The exception will be overruled.

The fourth exception is in reference to two other lots which the master has merely described by reference to the city atlas of Trenton, on which they appear to be laid down. He should have reported a description of these lots.

The fifth exception, which is to the report that the property cannot be divided without great prejudice, has already been disposed of in passing upon the exceptions of the complainants.

By the sixth exception, objection is made because the master, in fixing the amount for which Dr. Taylor is to account, in respect of certain rent received by him from John Kennedy, has made no deduction or allowance in respect to the share of his wife, who is one of the tenants in common. In this, the master has erred.

The seventh exception, that the master erred in charging Dr. Taylor with rent received from Mrs. Cornell, at the rate of \$60 a year, whereas he only received rent from her at the rate of \$55 a year, is well taken.

The eighth, which is based on the non-allowance of \$50, which, it is alleged, were allowed by Dr. Taylor to Pashley, as tenant of part of the property, is not well taken. It does not appear, from the evidence, that Dr. Taylor made any allowance to Pashley for repairs to those premises.

The last exception was not presented for decision, it being suggested, by the counsel of the parties, that they could agree in reference to the matter which is the subject of it.

Danforth v. Philadelphia & Cape May Short Line Railway Co.

CHARLES E. DANFORTH and others

v.

THE PHILADELPHIA AND CAPE MAY SHORT LINE RAILWAY
COMPANY.

1. Specific performance was refused of a contract to build and equip a railroad, although the contract price was to be paid in the stock and bonds of the company, and the estimates, &c., were to be made by the company. The company declared its inability to comply with the requirements of a supplement to the act (a general law) under which it was incorporated, and the penalty for non-compliance therewith was, by the supplement, declared to be the forfeiture of its charter. It therefore, and merely for that reason, declined to proceed further under the contract.

2. The court refused to consider the constitutionality of such supplement, so far as the defendants were concerned, and also refused to direct them to make estimates for the work already done under the contract.

Bill for specific performance. On final hearing on bill and answer.

Mr. J. W. Griggs, for complainants.

Mr. W. A. House, for defendants.

NOTE.—Specific performance will not be decreed of a contract requiring the direct superintendence of the court, nor where the contract or duties to be performed are continuous. The following cases are examples of the application of this rule:

Erecting a structure, or rebuilding or repairing. (*Beck v. Allison*, 56 N. Y. 366, reversing S. C., 4 *Daly* 422, where all of the early cases are referred to; *Wilkinson v. Clements*, L. R. (8 Ch.) 96; *Brace v. Wehnert*, 25 *Beav.* 348; *Martin v. Halley*, 61 *Mo.* 196; *Justices v. Croft*, 18 *Ga.* 473; *Birchett v. Bolling*, 5 *Munf.* 442; *Raynor v. Stone*, 2 *Eden Ch.* 128; *Reed v. Vidal*, 5 *Rich. Eq.* 289; *Hall v. Boyd*, 14 *Ga.* 1; *Denniston v. Coquillard*, 5 *McLean* 253. See *Whitworth v. Harris*, 40 *Miss.* 483; *Tildesley v. Clarkson*, 30 *Beav.* 419; *Rindge v. Baker*, 57 *N. Y.* 209; *Wilson v. Northampton R. R. Co.*, L. R. (9 Ch.) 279; *Printup v. Mitchell*, 17 *Ga.* 558; *Wells v. Maxwell*, 32 *Beav.* 408; *Gray v. Hawkins*, 8 *Ohio St.* 449.)

Danforth v. Philadelphia & Cape May Short Line Railway Co.

THE CHANCELLOR.

The bill is filed to obtain a decree for specific performance, by the defendants, of a contract entered into between the complainants, partners in business, and them, on the 19th of December, 1877, by which the former agreed to construct, equip and finish, for the latter, a single-track, narrow-gauge railroad, and telegraph line in connection therewith, from the terminus of the Camden, Gloucester & Mount Ephraim Railway to high-water mark in the city of Cape May, with stations, engine and freight-houses, machine and repair-shops, turn-tables, water-stations, &c., &c., and all necessary terminal facilities, for \$2,000,000, payable in the capital stock and first mortgage bonds of the company.

By the contract, the complainants were to complete the work within five months after the bonds were negotiated and sold at a price not less than ninety cents on a dollar of the par value thereof; and it was stipulated that they should not be sold at less than that price without the consent of both parties.

The bill states that the complainants entered on the work, and proceeded with it from the date of the contract to the 20th of February following; that there was, at the latter date, due to them, under the contract, the sum of \$40,000, or thereabouts; that they were then entitled to have an estimate made, but the defendants refused to make it, or to pay them, or to carry out the contract, which the complain-

A party was compelled to put another story on a market-house, after the deed therefor had been delivered to him on that condition. (*Providence v. St. John*, 2 R. I. 46. See *Price v. Penzance*, 4 Hare 506.)

A landlord was decreed to repair, in a case where the tenant would otherwise have been irretrievably injured. (*Valloton v. Seignett*, 2 Abb. Pr. 121.)

Performance was decreed of a covenant not to erect a building within a specified distance. (*Lloyd v. London, &c. R. R.*, 2 DeG. J. & S. 568. See *St. Louis R. R. Co. v. Mathers*, 71 Ill. 592.)

Although a contract may be carried out to construct approaches to a railroad track (*Stover v. Gt. Western R. R. Co.*, 6 Jur. 1009; *Wilson v. Furrness R. R. Co.*, L. R. (9 Eq.) 28; *Sanderson v. Cockermouth R. R.*, 11 Beav. 497; *Raphael v. Thames Valley R. R.*, L. R. (2 Eq.) 37, reversed, L. R. (2 Ch.) 147; see *McCue v. Ralston*, 9 Gratt. 430); or a drain thereunder

Danforth v. Philadelphia & Cape May Short Line Railway Co.

ants allege would be of great value to them if performed; and, further, that the defendants cannot respond in damages for their refusal to carry out the agreement; and that the complainants could profitably dispose of the bonds and stock stipulated for as payment. The bill prays that the defendants may be decreed to specifically perform the contract generally, and, also, that they may be required to make the estimate before mentioned, and deliver bonds and stock to the complainants for the amount which may be found due them thereon.

The defendants' answer admits the contract and declares their willingness to perform it, but alleges their inability to do so by reason of the provisions of an act of the legislature of this state (a supplement to the general railroad law), approved on the 19th of February, 1878. By one of those provisions the provision of the original act requiring that the articles of association should not be filed until at least \$2,000 of stock for every mile of the proposed railroad should have been subscribed and ten per cent. paid thereon, was altered so as to require that the entire amount of \$2,000 per mile shall be paid to the treasurer of this state, to be repaid by him to the directors or treasurer of the company in the manner specified in the supplement, as the work of constructing the railroad shall progress. By the other, the provision of the original act which authorized the mortgaging of the road, &c., of the company, to secure

(*Powell v. Gt. Western R. R.*, 1 Jur. (N. S.) 773); or a siding (*Lytton v. Gt. Northern R. R.*, 2 K. & J. 394; *Green v. West Cheshire R. R.*, L. R. (13 Eq.) 44; *Windham Cotton Co. v. Hartford R. R. Co.*, 23 Conn. 373); yet the court will not build a railroad (see cases *infra* p. 15); nor enforce a contract to locate it in a particular place (*Linder v. Carpenter*, 62 Ill. 309; *Bestor v. Wathen*, 60 Ill. 138; *Marsh v. Fairbury R. R.*, 64 Ill. 414; see *Borders v. Murphy*, 68 Ill. 81); or a depot (*Haisten v. Savannah R. R.*, 51 Ga. 199; *St. Louis R. R. Co. v. Mathers*, 71 Ill. 592; *Aiken v. A. V. & C. R. R.*, 26 Barb. 289; *Hubbard v. K. P. & St. Jo. R. R.*, 63 Mo. 68); nor operate a railroad (*Powell v. Tuff R. R. Co.*, L. R. (9 Ch. Ap.) 331; *McCann v. Nashville R. R. Co.*, 2 Tenn. Ch. 773; *Blanchard v. Detroit R. R. Co.*, 31 Mich. 43; *Atlanta R. R. Co. v. Speer*, 32 Ga. 550; *Johnson v. Shrewsbury R. R. Co.*, 3 DeG. M. & G. 914; *Blackett v. Bates*, L. R. (1 Ch. Ap.) 117; *Port Clinton R. R. Co. v. Cleveland R. R. Co.*, 13 Ohio St. 544; see *Hood v.*

Danforth v. Philadelphia & Cape May Short Line Railway Co.

the payment of their bonds to an amount not exceeding the amount of the paid-up capital stock, was altered by adding a provision that if any person or persons shall issue such bonds to any greater amount than the amount which at the time of such issue shall have been actually paid up on the capital stock of the company, he, she or they shall be guilty of a misdemeanor, and, on conviction, be punished by fine of not more than \$5,000 or imprisonment at hard labor for not more than three years, or both, at the discretion of the court. These provisions of the supplement were therein expressly made applicable to corporations already organized under the original act. The defendants state that they have expended all the money received by them on account of their capital stock in the work on the road, and that they are not able to comply with the provisions of the supplement, and that, by the terms of the supplement, their charter is forfeited, by reason of their failure to comply with the provisions of that act.

There are several considerations which forbid the granting of the relief prayed for in this suit. If this court would undertake the performance of such a contract as that stated in the bill, a contract for building and equipping a long line of railroad, building station, freight and engine-houses, &c., &c. (and the current and great weight of authority is decidedly against it, *Story's Eq. Jur.*, § 726; *Ross v. Union Pacific R. R. Co.*, 1 *Woolw.* 26; *Fallon v.*

North Eastern R. R., *L. R.* (8 *Eq. Cas.*) 666, (5 *Ch. Ap.*) 525; *Del. Lack. & W. R. R. v. Erie R. R.*, 6 *C. E. Gr.* 298; *Shacklen v. Eastern R. R.*, 98 *Mass.* 93; *Rigby v. Gt. Western R. R.*, 2 *Phil.* 44; *Niagara Bridge Co. v. Gt. Western R. R.*, 29 *Barb.* 213; nor, repair cattle-guards (*Columbus R. R. Co. v. Watson*, 26 *Ind.* 50); nor compel a railroad to ship all of its grain through a certain elevator (*Richmond v. Dubuque R. R.*, 33 *Iowa* 422; see *Chicago R. R. v. C. & V. R. R.*, 79 *Ill.* 121; *Lynn v. Mt. Savage Iron Co.*, 34 *Md.* 603); nor, carry on a colliery (*Fothergill v. Rowland*, *L. R.* (17 *Eq.*) 132; *Wheatley v. Westminster Coal Co.*, *L. R.* (9 *Eq.*) 538); or, a quarry (*Marble Co. v. Ripley*, 10 *Wall.* 339; *Booth v. Pollard*, 4 *Y. & C.* 61; see *Pollard v. Clayton*, 1 *K. & J.* 462; *Rider v. Gray*, 10 *Md.* 282); or, a newspaper (*Tinkler v. Hindmarsh*, 2 *Beav.* 350); or, compel a man to keep open an inn (*Hooper v. Broderick*, 11 *Sim.* 47); or, to cultivate a crop in a particular way (*Starnes v. Newson*, 1 *Tenn. Ch.* 239).—REP.

Danforth v. Philadelphia & Cape May Short Line Railway Co.

Railroad Co., 1 *Dillon* 121; *South Wales Railw. Co. v. Wythes*, 5 *DeG. M. & G.* 880), the disability of the defendants would be a sufficient reason for refusing. Courts of equity will never undertake to enforce specific performance of an agreement where the decree would be a vain or imperfect act. *Tobey v. The County of Bristol*, 2 *Story* 800. And the incapacity of the defendant to carry the contract into execution affords a ground of defence in a suit for specific performance. *Fry on Spec. Perf.* § 658.

In this case the defendants are willing to perform their part of the contract if they can lawfully do so. They have never refused to issue their bonds and stock to the complainants in accordance with the terms of the contract, except because of the provisions of the supplement above referred to, under which they apprehend they may have lost their corporate existence, and by which, if their corporate existence be not lost, their directors and officers who should act in the matter would be liable to severe and ignominious punishment for so doing (*P. L.* 1878, p. 23). They have not complied with the provisions of the supplement in reference to the amount to be paid in on their capital stock, and have not been able and are not able to do so. Only ten per cent. of the amount of their capital stock has been paid in. Their corporate powers are, according to the supplement, extinct, and the corporation is dissolved (*P. L.* 1878, p. 22). The complainants, however, insist that the supplement is an unconstitutional law; that it destroys their contract, which existed when it was passed, and which was founded on the faith of the original act; that it deprives them of their vested rights thereunder, and that it should be declared to be unconstitutional, and its provisions, so far as they are subject to that objection, disregarded. But it is in nowise necessary to consider that question; for, if there were no other valid objection, this court would not, under the circumstances of the case, declare that the apprehensions, or doubts at least, of the defendants, as to the validity of the supplement, are wholly groundless, and

Powers v. Chaplain.

direct them to proceed, notwithstanding the penalties above mentioned, to issue bonds according to the contract and in violation of the prohibition of the supplement; to subject themselves to indictment for misdemeanor and the consequences of conviction. It is enough that the legislature has forbidden them to issue the bonds to induce this court to refuse to order them to issue them. But, further, there is at least doubt whether the company still has a corporate existence.

Though the court might, if the case were free from these difficulties, direct the defendants to make the estimate of work already done prayed for in the bill, (*Waring v. Manchester, &c. Railw. Co.*, 7 *Hare* 482,) yet, for the considerations already presented, that relief must also be denied.

The bill will be dismissed.

HOLLIS L. POWERS

v.

CHARLES L. CHAPLAIN and others.

Although, by the terms imposed upon a defendant who is let in to answer, he is prevented from setting up usury, yet, if usury be proved, the complainant will be allowed to recover only the amount equitably due upon his mortgage.

Bill to foreclose.

Mr. S. Howell Jones, for complainant.

Mr. W. B. Williams and *Mr. Robert W. Wright*, of counsel for Chaplain.

THE CHANCELLOR.

The defendant Charles L. Chaplain was let in to answer, but on terms prohibiting him from setting up an uncon-

Powers v. Chaplain.

scientious defence. He alleges, in his answer, that the complainant's mortgage, which is a second mortgage on land in Newark, and was made by him on the 24th of January, 1874, in favor of Henry D. Walker, and purporting to secure the payment of \$8,000 in fifteen months from that date, with lawful interest, payable half-yearly, was made without consideration, and merely in order that Walker might raise the money upon it for him; that Walker did not negotiate it, but that he himself did; that he sold it to the complainant, on the 27th of March, 1874, for the sum of \$7,000 then paid to him therefor by the latter, and that the complainant then was informed that the mortgage had been made without consideration, and merely to be negotiated; and he insists that the complainant is entitled only to that sum of principal, less the amount of interest paid on the premium (\$1,000) and the amount of a note of \$244.38, given by him to the complainant in April, 1876, as a further premium. The complainant, on the other hand, denies that Chaplain sold the mortgage to him, but alleges that he bought it of Walker, with the understanding that it secured an actual indebtedness of \$8,000 from Chaplain to the latter, and he claims that he is entitled to receive that sum, with interest thereon from July 24th, 1876.

There is a contrariety of testimony between Chaplain and Walker on the one hand and the complainant on the other, in regard to the circumstances of the negotiation of the sale of the mortgage. Chaplain and Walker swear that it was conducted entirely by Chaplain with the complainant, while the complainant as distinctly swears that it was conducted with him not by Chaplain, but by Walker; he swears that neither Walker nor Chaplain told him that the mortgage was made without consideration, but that, on the contrary, the former assured him that it was given for full consideration. There are some facts in the case, however, which are either wholly undisputed or proved beyond question. They are, that the bond and mortgage were made without consideration, and merely to be sold by Walker for the benefit of

Powers v. Chaplain.

Chaplain; that the complainant paid only \$7,000 as consideration for the assignment of the bond and mortgage to him, all of which was received by Chaplain; that the latter called upon the complainant in reference to the assignment, and made the arrangement for it; that the affidavit which was delivered with the assignment contained no statement that the mortgage was made for a good and valid consideration; that the note of \$244.38 was given by Chaplain to the complainant, for premium, in April, 1876, and that interest was paid up to July 24th, 1876, on the whole sum of \$8,000.

The proof in the case does not support the complainant's statement of the transaction in question. Chaplain positively swears that the sale was made by him, but, though speaking with positiveness, he appears to speak from impression rather than from recollection as to his having informed the complainant in the negotiation that the mortgage was made without consideration, and merely for the purpose of being negotiated for him by Walker. Walker, however, not only swears positively that he did not himself negotiate the sale, and that it was effected by Chaplain and David A. Hayes, deceased, late of Newark, who appears to have been Chaplain's attorney, but he also swears, positively, that when he received the check for the \$7,000 from the complainant, he told the latter that the mortgage was made to him without consideration, that he had paid nothing for it, and that it was made to him for the purpose of sale and transfer. In corroboration of the statements of Chaplain and Walker is the evidence of the affidavit. It was made by Chaplain and Walker, and though it states that the mortgage is a good and valid one, which Chaplain is bound to pay, and that neither they nor either of them had any legal or valid defence to the payment thereof, and that Walker had full power and lawful authority to assign it, it is silent as to the consideration. The complainant, indeed, says he objected to it on that account, but was satisfied, by the statement of Mr. Hayes, that "it made no difference;

Powers v. Chaplain.

that the usury laws of New Jersey were entirely different from those of New York." His lawyer and witness, Mr. Gilman, however, says that the criticism on the affidavit was merely that it was not quite such as was usual in such cases in New York, and that, in reply, Mr. Hayes said it was sufficient in New Jersey. He says there was nothing said in his presence (and he was present at the whole transaction, and heard all that was said,) about the consideration of the mortgage. And, again, he says that the question of consideration was not brought up, to the best of his recollection.

According to the testimony of the complainant and Gilman and Walker, Chaplain was present when the transfer was made. If so, it is quite probable that the reason why he took so much interest in the assignment of the bond and mortgage was stated to the complainant, or at least was understood by him.

The character of the complainant's testimony in regard to the note of \$244.38, is such as materially to detract from the weight of his testimony in the cause, in comparison with that of Chaplain and Walker.

The evidence leads to the conclusion that the complainant, when he took the assignment of the bond and mortgage, fully understood that he was lending \$7,000 to Chaplain on securities which, though on their face in favor of Walker, had been so drawn merely to facilitate the disposition thereof at a rate in excess of the lawful rate of interest, and fully understood, also, that the difference between the amount advanced and the amount the payment of which the bond and mortgage purported to secure was premium for the loan. It is proved that the note of \$244.38 was given to him, on his application, as further premium for the same loan.

By the operation of the terms imposed upon Chaplain, on letting him in to answer, the complainant is saved from the consequences of the usury; but he will be permitted to recover only what is equitably his due.

Coe v. N. J. Midland Railway Co.

Allaire v. Hartshorne, 1 Zab. 665; *Campbell v. Nichols*, 4 Vr. 81. He is entitled to recover, under his mortgage, \$7,000 only of principal money, less the interest received by him on the \$1,000 premium, and less, also, the \$244.38. *Trusdell v. Jones*, 8 C. E. Gr. 121; *S. C. on appeal*, *Id.* 554. And he is entitled to interest on the principal due him as so calculated, from the 24th of July, 1876, and to costs.

GEORGE S. COE and others

v.

THE NEW JERSEY MIDLAND RAILWAY COMPANY and others.

By virtue of an agreement with the owner of certain lands, a railroad company, before paying the sum stipulated, entered upon the land, built their road thereon and included it in a general mortgage of their lands, &c. After their insolvency, and the appointment of a receiver by this court, the owner applied for the payment of the amount. It appearing that the sum agreed upon was grossly exorbitant, the court refused to order its payment, but directed that the compensation justly due the owner be ascertained and paid.

Bill to foreclose. On petition of Francis B. Wallace for an order that the receivers in this cause pay to him certain moneys, and interest thereon, which the New Jersey Midland Railway Company agreed to pay him for land occupied by them with their railroad, &c.

Mr. John Linn, for the petitioner.

Mr. Alexander, of New York, for the complainants.

THE CHANCELLOR.

According to the statements of the petition, the petitioner, on the 1st of July, 1870, agreed to sell to the railroad com-

Coe v. N. J. Midland Railway Co.

pany, for their railroad, certain land belonging to him, and the timber thereon, for the sum of \$2,572.73; he reserving all minerals in the property. They also agreed, as part of the consideration, to fence the land and keep the fence in repair. They took possession of the land, and laid down their track thereon, and it has been used by them, or by the receivers, ever since, the track being part of the main road.

In October, 1874, the petitioner demanded a settlement, and it was then agreed, between the company and him, that he would accept their promissory notes, running through a period of fifteen months, for the price, with the understanding that, if the notes were paid at their maturity, he would convey the land to the company; but, otherwise, he was to be at liberty to have recourse to his legal remedies for the recovery of the property. The notes were not, in fact, given, nor was the agreement signed, and the matter rested on the verbal understanding between the parties, until the proceedings in insolvency were taken. The land has, ever since then, been, as it still is, in the possession of the receivers appointed by this court. Mr. Garret A. Hobart was appointed receiver in the insolvency proceedings. Subsequently, this suit, for foreclosure of the first mortgage on the railroad, was commenced, and, under it, Mr. Hobart and Mr. James W. McCulloh were appointed receivers. The petition asks that an order may be made, directing them to pay to the petitioner the amount which the company agreed to pay him, with interest. It appears, very clearly, by the evidence taken under the order to show cause, granted on filing the petition, that the price which was agreed upon for the land and damages is about three times as much as ought to have been awarded by commissioners or a jury. The title to the land is still in the petitioner. It was never conveyed to the company. If I were satisfied that the price was not unreasonable, I would, in order to preserve the integrity of the mortgaged premises, to which the property is essential, direct that it be paid, but I am unwilling to authorize the payment of an exorbitant price. On the other

hand, I would not, under the circumstances, permit the petitioner, were he to seek to do so, to retake the land, because, by his consent, it has become a part of the railroad, and has been improved, and for years has been in use as such. He is entitled only to compensation, and, under the circumstances, it is a mere question of value. *Pickert v. Ridgefield Park R. R. Co.*, 10 C. E. Gr. 316, and cases there cited, especially, *Wood v. Charing Cross Railw. Co.*, 33 Bear. 290. See, also, *Erie, R. R. Co. v. Del., Lack. & West. R. R. Co.*, 6 C. E. Gr. 283. It may be remarked that the company has not yet lost its corporate existence, or been deprived of its franchises, it being within the provision of the third section of the act of March 8th, 1877, entitled "A supplement to an act entitled 'An act concerning corporations' (Rev. p. 1289), approved April 7th, 1875," and it is within the power of this court to permit it to take proceedings to condemn the land if such course were necessary.

The prayer of the petition is not, in the alternative, for pay or possession. The petitioner does not seek to be permitted to take possession of the property, but only asks for an order directing the payment of the money which the company agreed to pay him, and interest thereon; but he may well be considered, for the purposes of this decision, as asking for possession, in case such payment be not ordered.

While I decline, for the reasons I have given, to make the order for which application is made, I will direct the payment of just compensation, to be ascertained by this court.

THE STEVENS INSTITUTE OF TECHNOLOGY

v.

EDWARD SHERIDAN and others.

A mortgagee cannot avail himself of an assumption of a mortgage inserted in a deed of the premises by the mistake of a scrivener in copying the grantor's deed; neither of the parties to the deed intending or being aware of it.

Bell v. Romaine.

Bill to foreclose. This cause was submitted, without argument, on the pleadings (the bill and the answer of Michael Forestil) and proofs.

THE CHANCELLOR.

The only question which appears to be raised by the pleadings is, whether Michael Forestil is liable for deficiency on an assumption contained in the deed of conveyance to him, from his father, John Forestil, for the mortgaged premises. The latter bought the property from Sheridan, the mortgagor. The deed to him contains an assumption, by him, of the mortgage. The evidence is clear that the assumption in the deed to Michael Forestil was inserted without the knowledge of either the grantor or the grantee; that its appearance in the deed is due to the circumstance that the deed was copied, by a scrivener, from the deed from Sheridan to John Forestil. Both John and Michael Forestil swear that they never knew, until after this suit was brought, that there was a clause of assumption in either of the deeds; that there was no agreement or understanding between them that Michael should assume the payment of the mortgage; and that there was no intention that he should do so. The evidence would be sufficient, in a suit between Michael and his father for the reformation of the deed by striking out the agreement of assumption, to warrant such relief.

The prayer for a personal decree for deficiency against Michael Forestil will be denied, (*Bull v. Titsworth*, 2 *Stew.* 73,) but without costs.

JAMES BELL

v.

ANN E. ROMAINE.

1. A married woman is within the rule requiring a party defendant to rely solely on his own affidavit in case the complainant in an injunction bill relies only on his affidavit; nor can she avail herself of

Bell v. Romaine.

her husband's affidavit to support her answer, although he acted as her agent in the matter in controversy.

2. A bond, secured by a mortgage, provided that on default in the payment of the interest thereon for thirty days after the same had become due, the principal should, at the option of the obligee, become payable.—*Held*, that after the obligee had ratified several parol extensions of the time for paying the interest, made by her agent, a subsequent similar extension would be deemed a waiver of the forfeiture, and a suit at law to enforce the bond on the ground of such forfeiture would be enjoined.

Bill for injunction to restrain defendant from prosecuting a suit at law. Motion to dissolve injunction on bill and answer.

Mr. John W. Griggs, for defendant.

Mr. G. A. Holart, for complainant.

THE CHANCELLOR.

The complainant, on the 28th of April, 1875, gave to the defendant his bond of that date, secured by his mortgage upon land in Paterson, for the payment of \$12,786.66 in five years from that time, with interest thereon, payable semi-annually on the 28th of October and April in each year, at the rate of seven per cent. per annum. The bond contained a special condition, which, according to the statements of the declaration in the suit at law on the bond, was, that if any default be made in the payment of the interest or any part thereof on the day when the same was made payable, and should the same remain unpaid and in arrear for the space of thirty days, then the principal sum, with all arrearage of interest thereon, should, at the option of the defendant obligee, become and be due and payable immediately thereafter, although the time limited in the bond might not have expired. The interest which fell due on the 28th of October, 1877, was not paid then, nor within thirty days thereafter. According to the statements of the

Bell v. Romaine.

bill, Helmas Romaine, the husband of the defendant, on the 4th of December, 1877, called on the complainant for payment of the interest. The complainant then desiring to be relieved from the necessity of making immediate payment, requested him to wait upon him for a few days further for the money, but said that he would pay it at that moment if Romaine must have it. Romaine then, being willing to accommodate the complainant, agreed to give further time for the payment of the interest, but no time was fixed. He then left the store of the complainant, but, on leaving, asked when he should call again, to which the complainant replied, "Very soon." On the 8th of December it was agreed between them that if the complainant should pay the interest some time during the next week (which would end on the 15th of the month), it would be satisfactory. On that occasion, in the conversation between them, Romaine told the complainant that he did not mean to take advantage of the non-payment of the interest within the thirty days, and added "that he would not do a mean thing by him." On the 13th of the month the complainant sent a check for the interest, accompanied by a note requesting a receipt for the money. The next day the check was returned to him by the attorney of the defendant, who informed him that the defendant would not accept it, but demanded payment of the principal, as well as the interest. On the 31st of December, the complainant tendered to Romaine the amount of the interest, with lawful interest thereon, but the latter refused to accept it, saying he had changed his mind, and would demand the whole of the principal and interest of the bond. On the 18th of January following the suit was brought on the bond, and on the 4th of March following the complainant filed his bill for an injunction. A preliminary injunction was allowed on the payment of the amount due for interest, and interest thereon, into this court.

The defendant has answered the bill, and now moves to dissolve the injunction on the bill and answer. The trans-

Bell v. Romaine.

actions on which the complainant's claim to relief is based were not within the defendant's knowledge. Her answer in reference to them is, therefore, no evidence. Nor can she avail herself of the affidavit of her husband, which is attached to the bill. The complainant relies on the averments of the bill and his own affidavit in support thereof, without the aid of affidavits of third parties annexed thereto, and therefore the defendant must rely solely on her answer, without resorting to the affidavits of third parties. *Gariss v. Gariss*, 2 *Beas.* 320. The complainant admits that her husband has been and is her agent and business manager, and has always had charge of the collection of the interest accruing on the bond and mortgage. The bill states that it has been the custom between the parties to accommodate each other, and, on the part of the complainant, to pay on the call and request of Romaine, who always fixed the time at which he would require the money at a later period than the expiration of the thirty days.

Equity will, for sufficient cause, relieve against forfeiture in such cases as this. *Baldwin v. Van Vorst*, 2 *Stock.* 577; *Martin v. Melville*, 3 *Stock.* 222; *DeGroot v. McCotter*, 4 *C. E. Gr.* 531; *Sire v. Wightman*, 10 *C. E. Gr.* 102. In the cases of *Baldwin v. Van Vorst*, *ubi supra*, and *Spring v. Fisk*, 6 *C. E. Gr.* 175, cited by the defendant's counsel, relief was denied because there was no equitable ground for it. In the former case the court said: "The defendant offers no excuse for his default, not even that of negligence, or of his inability to raise the money at the day. For anything appearing to the contrary, the default was willful, and without excuse, and intended to harass and inconvenience the complainant by withholding from him his interest-money. The defendant made no amends for his default until he was compelled to do so by the complainant's exhibiting his bill in this court." In *Spring v. Fisk*, the chancellor says: "The excuse in this case is not accident, or mistake, or even inadvertence, in the sense in which that term is used in such case in equity, but it is mere negligence." And, again, he says: "I do not

Bell v. Romaine.

feel willing to adopt the principle that, in a case like this, mere negligence will excuse the payment at the day and avoid the consequence of non-payment." In the case in hand there is evidence, on the statements of the bill, that the defendant's agent had habitually waived payment at the day, or within the thirty days. The complainant states that it had been his custom to pay the interest on the call and request of Romaine, who always fixed a period for payment beyond the thirty days. And, again, there appears, from the statements of the bill, to have been both an implied and an express waiver in respect to the interest which fell due in October, 1877. After the expiration of thirty days from that time, the interest being unpaid, Romaine agreed to give the complainant further time, although the latter expressed his willingness to pay at once if it was insisted upon. And, again, four days afterwards, a time was fixed by agreement between them within which it was to be paid. The time specified for paying a mortgage may be extended by parol. *Tompkins v. Tompkins*, 6 C. E. Gr. 338. Payment according to the parol agreement will, of course, prevent a default. *Ibid.*; *De Groot v. McCotter*, *ubi supra*. Said the court, in the latter case: "If the complainant has given further day of payment, or in any other way waived the payment, according to the letter of the bond, the default contemplated and provided against has not happened." The complainant in the case under consideration sent a check for the interest within the time agreed upon. It was subsequently returned to him; not, however, because it was not good for the amount—for no such reason was assigned—but because the defendant had determined to require payment of both principal and interest of the bond. The complainant says that Romaine told him, when the tender was made, that the reason why he would not accept was that he had changed his mind, and would demand the whole of the principal and interest due on the bond.

On the case as it stands, the motion to dissolve cannot prevail. It will be denied, with costs.

Manning v. Tuthill.

JOHN MANNING

v.

HENRIETTA L. TUTHILL.

The holder of a first mortgage discovering, during foreclosure, that certain taxes were a lien on the premises, paramount to all encumbrances, entered into an agreement, through his solicitor, with the solicitor of a second mortgagee, that if he, the first mortgagee, would pay the taxes, and the second mortgagee should buy the premises at the foreclosure sale, he should be repaid by the second mortgagee. After such payment, sale and purchase, the second mortgagee refused to refund the amount of the taxes.—*Held*, that the first mortgagee could not be subrogated to the original lien of the township for the taxes, and have the amount paid by him decreed a lien on the lands.

Bill and demurrer.*Mr. E. A. Day* and *Mr. Geo. S. Duryee*, for demurrants.*Mr. G. C. Cowart*, for complainant.

THE CHANCELLOR.

The case, stated by the bill, is that the complainant was the holder of the first, and the defendant of the second mortgage on certain land in East Orange, in Essex county; that the complainant had proceeded to final decree and execution, for the sale of the property, in a suit in this court, for foreclosure and sale of the premises to which the defendant was a party by reason of her mortgage, when he discovered that the property was liable to be sold for certain unpaid taxes which were a lien thereon, paramount to his mortgage; that the premises were then advertised to be sold under the execution; that his solicitor apprised the defendant's solicitor of the existence of the tax, and that the land was liable to be sold to pay it; that it was then agreed, between the solicitors, that if the complainant would pay

Manning v. Tuthill.

the tax, the defendant would, if she should be the purchaser of the property at the sale under the foreclosure, repay to him the money which he should so pay for the tax, with interest; and that she did buy the property at that sale, for a sum a little more than enough to pay the amount due the complainant for principal, interest and costs, and now refuses to pay according to that agreement.

The complainant seeks to establish an equitable lien on the property for the money and interest thereon, and, to that end, prays to be subrogated to the rights which the township authorities had for the collection of the tax.

It will have been perceived that this claim is based upon the agreement of the defendant's solicitor, that the defendant would, in a certain contingency—her purchase of the property at the foreclosure sale—repay to the complainant the amount of the tax, with interest. The tax was discharged. It was necessary to pay it for the protection of the complainant's mortgage, and he paid it accordingly. He might have had the amount included in the decree in the foreclosure suit. He did not do so, but chose to rely on the agreement of the defendant's solicitor, that the defendant would, if she should buy the property, repay the money to him. If the solicitor had authority thus to bind his client, the obligation was a legal one. The complainant has endeavored to enforce it at law, and has failed. As between him and the holders of encumbrances subsequent to his, he was entitled to subrogation, in the foreclosure suit, on the payment of the tax; but as against a purchaser at the sheriff's sale, he was not. His claim against the defendant depends entirely on the agreement to repay. From that, no equitable lien arises, nor can any be established upon it. The case, as stated most favorably for him, stands thus: Being compelled, in order to protect his claim under his mortgage, to pay the tax, he refrained from taking steps to obtain reimbursement in the foreclosure suit, because of the promise made by the defendant's solicitor that she would reimburse him in case she should become the purchaser. She having

Ward v. Kitchen.

become the purchaser, now refuses to re-imburse him. He sued her at law for the money, and was nonsuited. It is part of his case here, that he cannot recover at law. He then came into this court to compel the repayment, on the ground that the tax was paid for the benefit of the defendant's mortgage claim, as well as his own, and that she agreed to re-imburse him if she should buy the property. He seeks, in fact, to establish a lien on the property, because the payment, though made for his own protection, was, at the same time, incidentally for that of the defendant. Had a stranger bought the property, the claim would not have been made. It would not have been supposed to be capable of being maintained. It rests, then, on the conditional promise to pay. It has been held, at law, that an action against the defendant cannot be maintained upon that promise. If it be conceded that the defendant is legally liable on the promise, though made by her solicitor, then the remedy is at law. The fact that the money paid was paid for the discharge of a tax which was a lien upon the property, would not, of itself, give to the complainant the right of subrogation for repayment. If there had been no promise, there could be no shadow of claim for subrogation. The promise to repay will not give the right.

The demurrer will be sustained.

MARCUS L. WARD, executor,

v.

MARIA L. KITCHEN and others.

1. A *bona fide* division of the residue of an estate, consisting of both realty and personalty, as authorized by a will, is binding on the parties and all others interested.

NOTE.—In *Perry on Trusts* § 465, it is said that the distinction between an original investment improperly made by trustees and an investment made by the testator himself and simply continued by the trustees,

Ward v. Kitchen.

2. A direction to invest a share "in productive funds upon good securities," means only those that are designated by law; and a disregard of such requirement renders the executor personally liable, in case of loss or depreciation.

3. A specific legacy may remain invested in the stocks set apart and designated by the testator for the purpose in his will.

4. An executor, apprehending a depreciation in the stocks in which a specific legacy is invested, should protect the estate by converting them.

Bill for construction of will and for directions.

Mr. John W. Taylor, for complainant.

THE CHANCELLOR.

The complainant asks the direction of this court in the discharge of his duty as trustee under the will of Moses Ward, deceased, and asks, also, for a construction of part of that instrument, and of part of the codicil thereto. By the will the testator, after sundry gifts and provisions, gave one-half of all the residue of his estate, real and personal, to his son, the complainant, and of the remaining half he gave to his daughter Maria the "sum or value of \$6,000 to be at her own disposal," and provided as follows as to the residue of that half:

"Whatever remains of the said last-mentioned half, I direct my executor to invest in productive funds, upon good securities, and to collect and pay over to my said daughter the interest and income thereof, half-yearly, during her natural life."

cannot be safely acted upon. This rule is criticised in 13 *Am. Law Reg.* 208, and said to be not borne out by the cases cited to support it.

In *Ashhurst v. Potter*, 2 *Stew.* 625, 632, Mr. Barker Gummere was of opinion that such an investment by a testator would not justify its continuance by his executors.

See further, in addition to the cases cited in *Perry* and *Am. Law Reg.*, *Hogan v. DePeyster*, 20 *Barb.* 100; *Gray v. Lynch*, 8 *Gill* 403; 10 *N. Y. Leg. Obs.* 321; *Lacy v. Stamper*, 27 *Gratt.* 42; *Anderson v. Gregg*, 44 *Miss.* 170; *McMurtrie v. Penna. Co.*, 9 *Phila.* 529, 75 *Pa. St.* 304.—*REP.*

Ward v. Kitchen.

He provided, also, for the division of the residue between his son and daughter by their mutual agreement, declaring it to be his will that they might, by their own agreement and without sale, by releasing to each other, make division of any and all of the residue of his estate between themselves, so far as they could mutually agree upon the terms of division and the valuation of the property.

By the will he gave to his executor the sum of \$10,000 in trust, to be applied towards defraying the expense of erecting a wing to the asylum building of the Newark Orphan Asylum Association, provided the association should procure the necessary additional funds to build and finish the wing, and actually build and finish it within ten years from the time of his death. He further declared it to be his will that, until such additional funds were procured, the \$10,000 should be invested in productive funds, upon good and sufficient securities, and the interest and income thereof re-invested in like manner and added to the original sum, and that the whole should, if necessary, be applied to the before-mentioned purpose as soon as the additional funds to be provided by the association should be obtained and the work finished; provided it should be within the ten years. He further declared it to be his will that if funds from other sources should be procured for the purpose of such amount that, they being first applied thereto, any part of his bequest should remain unexpended, then that the residue of his bequest which should so remain unexpended should be invested or put out at interest on good and sufficient securities, and the yearly interest thereof be applied to the general uses and support of the institution. By the codicil, he revoked that bequest, and, in lieu thereof, gave to his executor, in trust, for the same purposes and on the same conditions, and subject to the same limitations, one hundred shares of the capital stock of the Newark Gas Light Company, fifty shares of the capital stock of the Newark Banking Company, and fifty shares of the capital stock of the State Bank at Newark; the dividends or profits arising

Ward v. Kitchen.

from those stocks to be collected, applied and disposed of in the same manner as, in his will, the interest of the \$10,000 was directed to be applied and disposed of.

The division of the residuary estate, which consisted, in part, of real estate and stock of the Newark Lime and Cement Manufacturing Company, the Newark Gas Light Company, the Mechanics National Bank of Newark, and the Newark City National Bank, was made by the complainant and his sister, her husband consenting thereto; and there were therein set off to the complainant, to be held by him, under the trust declared in the will, in respect to his sister's share of the residuary estate, certain shares of those stocks. All of those stocks are valuable, are above par in the market (the Lime and Cement Manufacturing Company's stock very exceptionally so), and all of them are regarded, by many very prudent business men, as excellent investments for their own money. These shares of stock were, in the division, taken at their market value, and they are still held by the complainant, as trustee for his sister at her request, because she, as well as he, regards them as entirely safe, as well as profitable, investments.

The condition on which the gift of stock to the complainant, for the benefit of the Newark Orphan Asylum Association, was made, has been complied with, the wing has been built, and there still remains, in the hands of the complainant, of that bequest, stock of the value of more than \$16,000.

The complainant asks whether the provision of the will as to the division of the residue by him and his sister, is valid, and whether the division so made will be binding, not only as against those who made it, during the life-time of his sister, but afterwards, as against all persons claiming as heirs at law of the testator or otherwise. Also, whether he may, without his sister's consent, dispose of the shares of stock which, in that division, were assigned to him to be held in trust as part of her share of the residue, and invest the proceeds in other securities, and whether it is his duty to make such conversion and investment, and whether he

Ward v. Kitchen.

will be liable to be held responsible, pecuniarily, for any depreciation in the value of those stocks should he fail to do so. Also, whether he may lawfully continue to hold, in the stock in which it was invested when the testator died and in which it came to the complainant's hands, the unexpended residue of the Orphan Asylum legacy, or whether it is his duty to convert that stock into cash and re-invest the amount in approved securities.

The power given by the testator, to the complainant and his sister, to divide between them, by mutual agreement, his residuary estate, is valid, and a division *bona fide*, made under it, is binding on all who are affected by or interested in it.

The trust, in respect to all of the daughter's share of the residuary estate, except the \$6,000 which were to be at her own disposal, is to invest it in productive funds, upon good securities, and to collect and pay over to her the interest and income thereof, half-yearly, during her natural life. Under this direction, the trustee would not be at liberty to invest the money in the stocks of banks and manufacturing companies, however exceptionally good, without incurring the responsibility of answering for any loss which might occur to the funds, either in interest or principal, by reason of such investment. If no directions are given in the will as to the conversion and investment of the trust property, the trustee, to be safe, must take care to invest the property in the securities pointed out by the law. *Perry on Trusts* § 465; *King v. Talbot*, 40 N. Y. 76. Nor will the fact that the testator himself made and approved of the investment, in the absence of express or implied directions in the will, relieve the trustee from responsibility in continuing, permanently, an investment made by the testator which the trustee himself would not be justified in making. *Ibid.* But the will itself furnishes evidence that the testator, in this case, intended that the investment should not be in stocks. As appears, by the provisions of the codicil changing the bequest to the Orphan Asylum, he thoroughly understood the difference between

Ward v. Kitchen.

a direction to invest in "productive funds upon good and sufficient securities" and apply the interest, and the gift of stocks with direction to apply the dividends. In the legacy to Mrs. Brown, and in the gift to the Orphan Asylum, in the will, the same language is used in the direction for investment which is employed in the residuary clause in regard to that part of the residuum which is to be held in trust for his daughter. The direction in the residuary clause is "to invest in productive funds upon good securities, and to collect and pay over to his daughter the interest and income thereof, half-yearly, during her natural life." In the provision in the codicil for the Orphan Asylum, the gift is of specific stocks, the dividends or profits arising from them to be collected, applied and disposed of as in the will; the interest of the \$10,000 was directed to be applied and disposed of. The direction to pay the interest or income to his daughter, half-yearly, is indicative of the character of investment which the testator had in contemplation. The direction to invest on good securities will be construed to mean investment on such securities, and on such securities only, as are regarded by the court as proper for the investment of trust funds. If the complainant shall fail so to invest the funds now held by him, in stocks, in trust for his sister, he will be liable to be required to make compensation, at least, for any loss of principal which may occur through depreciation of the stocks.

The gift to the Orphan Asylum stands on a different footing. It is a bequest to the complainant of specific shares of the capital stock of a gas light company and two banks, in trust for the same purposes to which, in his will, the testator had directed the \$10,000 to be applied, "the dividends or profits from the said stocks to be collected, applied and disposed of in the same manner" as in his will the interest of the \$10,000 was directed to be applied and disposed of. The complainant is not at liberty to convert this stock into money (*Neville v. Fortescue*, 16 Sim. 333; *Boys v. Boys*, 28

Haggerty v. Lanterman.

Beav. 436), unless the depreciation, or threatened depreciation, of it should render it prudent for him to do so in order to protect the trust fund, in which case he must act wisely in the emergency.

WILLIAM H. HAGGERTY, executor,

v.

EUPHEMIA LANTERMAN and others.

A testator, after directing all his debts to be paid, gave to each of his six children an equal share of all of his estate, the shares of his two daughters to be invested for their use during life, with remainder to their respective heirs. After appointing his son W. his sole executor, he concluded as follows: "My will and wish is to consult the heirs whether it will be best to sell it or otherwise—the homestead property."—*Held*, that a power of sale of the real estate vested in the executor, from his duty to divide the estate and invest the daughters' shares, and also from the condition of the estate, there being insufficient personalty to pay the debts, and the sons being unable to pay their debts to the testator except from their several shares of the realty.—*Held*, also, that the executor's power of sale over the homestead is not dependent upon obtaining the consent of all the heirs.

Bill for construction of will. On final hearing on pleadings and proofs.

Mr. L. Cochran, for complainant.

Mr. G. M. Shipman, for Mrs. Lanterman.

THE CHANCELLOR.

The question presented for adjudication is, whether, under the provisions of the will of Aaron Haggerty, deceased, the executor has power to sell the real estate of which the testator died seized. By the will, the testator,

Haggerty v. Lanterman.

after directing that his debts and funeral expenses be paid, gives a legacy to his wife; then gives to his four sons each an equal share of "all" his "estate;" then gives to his daughter Emeline the interest of her equal share of his "property" during her life, and afterwards "to go to her heirs, if she has any, and if not, to her brothers and sisters"; then gives to his daughter Almira "an equal share with his sons"; and then gives to his daughter Euphemia "an equal share with the rest; to have the interest of it during her life-time; if she has heirs, to go to them; if she has none, to go to her brothers and sisters." The will concludes as follows:

"I appoint my beloved and trusty son, William H. Haggerty, my sole executor of this my last will and testament. My will and wish is to consult the heirs whether it will be best to sell it or otherwise—the homestead property."

The scheme of the will is an equal division, among his children, of the testator's entire estate, real and personal, after paying the legacy to his widow; his daughters, however, to have only the interest of their respective shares for life. This scheme not only contemplates a division of all the property, but also the investment of the shares of the daughters, which involves a conversion of the real property into cash. To make the division and the investment are part of the duties of the executor. *Jones's ex'r v. Stiles*, 4 C. E. Gr. 324; *Parker's ex'r v. Moore*, 10 C. E. Gr. 228; *South v. Allen*, 5 Mod. 101. To these ends there must be a sale of the real property. Where a testator directed that his real and personal estate be sold and divided amongst his sisters, a power to the executors to sell the real estate was implied. *Tylden v. Hyde*, 2 S. & S. 238. The better opinion at present seems to be, says Judge Redfield, that the mere fact that the avails of real estate, after it is converted into money, is directed to go in such a direction that it will have to pass through the hands of the executor in the form of money, will, by implication, give a power of sale. 2 Redf.

Haggerty v. Lanterman.

on Wills 124. See, also, *Dewey v. Ruggles*, 10 C. E. Gr. 35, and *Whitehead v. Wilson*, 2 Stew. 396; *Theobald on Wills* 234-238; 1 Wms. on Ex'rs 655; *Going v. Emery*, 16 Pick. 107. If the executor is directed by the will, or bound by law, to see to the application of the proceeds of the sale, or if the proceeds in the disposition of them are mixed up and blended with the personalty which it is the duty of the executor to dispose of and pay over, then a power of sale is conferred on the executor by implication. *Lippincott's ex'r v. Lippincott*, 4 C. E. Gr. 121, 122. But there is direct evidence in this will of the intention of the testator to give to his executor power to sell his real estate. The language of the concluding clause of the last section, above quoted, distinctly indicates that intention. The testator there expresses his desire that the executor consult with the testator's other children as to the expediency of selling the homestead property. He desires to respect their wishes on that subject, but the power to sell is not dependent on their consent. He did not intend that the power of sale should be clogged by the necessity of obtaining the consent of all his children. In fact (it may be remarked), all of them except Euphemia are desirous that the executor should sell the property.

There is still another consideration which may be added. The testator's personal estate, if the amounts due to him from his sons be not included (and some of his sons are unable to pay those debts except out of their shares of his estate), is insufficient to pay his debts. He evidently intended that the debts due him from his sons should be paid by the sons in the distribution of his estate to them under his will, and he intended that his executor should have power to sell his real estate, and that he should do so, unless some arrangement should be made among his children which should render a sale unnecessary.

The language of Chief Justice Shaw, in *Going v. Emery*, above cited, is applicable to the will under consideration: "The will is certainly very inartificially drawn, but this circumstance is never held to affect the validity of a will when

Hiles v. Coult.

the meaning of any particular clause, expounded by a consideration of all other parts of the will, can be ascertained with reasonable accuracy. The rule then applies that if a testator, having a right to dispose of his real estate, directs that to be done by his executor which necessarily implies that the estate is first to be sold, a power is given by this implication to the executor to make such sale and execute the requisite deeds of conveyance."

THOMAS S. HILES

v.

JOSEPH COULT and others.

Where the grantee of a mortgagor conveys the mortgaged premises in different parcels, and the grantees of such parcels again convey them in parcels,—*Held*, that the grantees of the latter parcels are liable to pay the share of the mortgage debt chargeable on the part of the mortgaged premises of which the premises conveyed to them are part, in the inverse order of conveyance to them.

Bill to foreclose. On petition to open final decree, &c.

Mr. C. J. Roe, for petitioners.

Mr. L. Cochran, for complainant.

THE CHANCELLOR.

By the final decree in this cause, it is directed that a certain part of the mortgaged premises, which was conveyed by Joseph Coult and his wife to Isaac A. Walker, on the 1st of July, 1868, be sold to raise a part of the money due on the complainant's mortgage, which was, when the conveyance to Walker was made by Coult, an encumbrance on that and

Hiles v. Coult.

other land. Walker, subsequently, by two deeds, one dated January 18th, 1869, and the other dated February 4th in that year, conveyed two parcels of the property to the petitioners. On the 20th of November following, he conveyed the rest of the property to the complainant, who, on the 16th of September, 1876, conveyed it to Mary E. Schofield. The petition prays that the decree may be so amended as to direct that the property be sold to raise the before-mentioned proportion of the money due on the complainant's mortgage, with interest and costs, in inverse order of the conveyances; that is, that the part conveyed to and now held by Mary E. Schofield be sold for that purpose before the property of the petitioners. The conveyances by Walker were all by deeds of warranty, and neither the petitioner nor the complainant knew, at the time of taking the conveyances to them, of the existence of the mortgage now held by the complainant. They all, however, had constructive notice of it, it having been duly recorded.

It is the established rule of this court that, if a mortgagor sell the land covered by the mortgage in different parcels and at different times, the parcels shall be sold to raise the money to discharge the mortgage debt in the inverse order of their alienation. *Shannon v. Marselis, Sax.* 413. And this rule applies though the sales in parcels were made, not by the mortgagor, but by a person claiming under him. *Wikoff v. Davis, 3 Gr. Ch.* 224. It is applicable, also, to a case such as the present. When the petitioners bought the part of the property which was conveyed to them, it was subject to the mortgage, but the rest of the property remained in the hands of Walker, and, as between him and them, that part so retained by him was liable, in equity, to be first sold to pay the mortgage. It is to be regarded as having been then equitably charged with the payment of the mortgage debt, and the complainant, when he purchased it from Walker, took the place of the latter, and took the land so charged in equity. That land, now owned by Mary

Hardenburgh v. Blair.

E. Schofield, must, as between her and the petitioners, be first sold to raise the proportion of the mortgage debt, interest and costs, decreed to be raised by sale of the Walker property.

AUGUSTUS A. HARDENBURGH and others, executors &c.,

v.

JOHN A. BLAIR, receiver &c., and others.

A testator gave to his executors a fund, in trust, for each of his four children and his or her issue, and "to safely invest it and pay to each one of his children the interest and income of it during his or her natural life, in such manner and in such amounts as the executors shall deem most prudent." On a bill filed by the executors for the construction of this clause, and for directions as to their duty,—*Held*, that they must apply so much of the income of one of the children as will be sufficient to satisfy a judgment recovered against him, a receiver having been appointed under supplemental proceedings on the execution, and it appearing, by the bill, that of the income coming to the legatee the executors have enough money in their hands, over and above the amount which they deem it prudent to pay the legatee, to satisfy the judgment with costs and interest.

Bill for relief. On final hearing on bill and answers.

NOTE.—Trusts cannot, generally speaking, be created with a proviso that the equitable estate or interest of the *cestui que trust* shall not be alienated. *Perry on Trusts* § 386; *Story's Eq. Juris.* § 974a; 3 *Wms. on Ex'rs* 1374; and see especially *Mandlebaum v. McDonnell*, 29 *Mich.* 78, reviewing the principal cases; *Teague's Case*, *L. R.* (10 *Eq.*) 564.

A bequest of money in trust for W., "not subject to any debt or debts he may have contracted, but for his comfort and support,"—*Held*, subject to his debts, nevertheless, because the condition is void. *Smith v. Moore*, 37 *Ala.* 327; *Mebane v. Mebane*, 4 *Ired. Eq.* 131; *Gray v. Obear*, 54 *Ga.* 231; *McIlwaine v. Smith*, 42 *Mo.* 45; see *Stagg v. Beekman*, 2 *Edw. Ch.* 89; *Nichols v. Levy*, 5 *Wall.* 433. The United States supreme court, however, in *Nichols v. Eaton*, 1 *Otto* 716, refused to sanction the doctrine that the power of alienation is a necessary incident to a devisee's life estate in real property, or that his interest, rents and profits of real estate, or dividends and income of personal

Hardenburgh v. Blair.

Mr. L. Zabriskie, for complainants.

Mr. H. Traphagen, for defendant Blair.

THE CHANCELLOR.

Charles G. Sisson, deceased, formerly of Jersey City, by his will gave to his executors \$1,000,000 in trust, to hold \$250,000 of it for each of his four children, and his or her issue, and to safely invest it and pay to each one of his children the interest and income of it during his or her natural life, in such manner and in such amounts as the executors should deem most prudent.

The testator died August 21st, 1874. His executors, the complainants, hold, on the above-mentioned trust, \$250,000

property, cannot be given and granted by a testator free from all liability for the debts of the grantee (see 10 *Am. Law Rev.* 591, criticising this decision); also, *Still v. Spear*, 3 *Grant's Cas.* 306; *Shankland's Appeal*, 47 *Pa. St.* 113; *Rife v. Geyer*, 59 *Pa. St.* 393; *Wells v. McCall*, 64 *Pa. St.* 207.

Devises or bequests forbidding alienation for a limited time, or to a particular person, are good. *Perry &c., supra*; *McKinster v. Smith*, 27 *Conn.* 628; *Maclear's Case*, *L. R.* (20 *Eq.*) 186; *Stewart v. Brady*, 3 *Bush (Ky.)* 623; *Humersley v. Smith*, 4 *Whart.* 126, 128; see *Blackwell v. Blackwell*, 3 *Gr.* 386; *Van Middlesworth v. Schenck*, 3 *Hal.* 29; *Lippincott v. Ridgway*, 2 *Stock.* 164; *Attwater v. Attwater*, 18 *Beav.* 330; *Teague's Case*, *L. R.* (10 *Eq.*) 564; *Cunynghame's Case*, *L. R.* (11 *Eq.*) 324. Also, gifts to be forfeited on the bankruptcy or insolvency of the donee. *Perry, &c., supra*; see, further, the following recent cases: *White v. Chitty*, *L. R.* (1 *Eq.*) 372; *Cox v. Fonblanque*, *L. R.* (6 *Eq.*) 482; *Lloyd v. Lloyd*, *L. R.* (2 *Eq.*) 722; *Trappes v. Meredith*, *L. R.* (9 *Eq.*) 229; *Hatton v. May*, *L. R.* (3 *Ch.*) 148; *Hunt v. Furber*, *L. R.* (3 *Ch.*) 285; *Sharp v. Cusserat*, 20 *Beav.* 470; *Manning v. Chambers*, 1 *DeG. & Sm.* 282; *Otham v. Oldham*, *L. R.* (3 *Eq.*) 404; *Nichols v. Eaton*, 1 *Otto* 716; *Bridge v. Ward*, 35 *Wis.* 687; *Tillinghast v. Bradford*, 5 *R. I.* 205; *Bryan v. Knickerbacker*, 1 *Barb. Ch.* 409. But if the prohibition against alienation does not include a forfeiture of the estate as its consequence, the *cestui que trust* may assign his interest, and the assignee has a right to an account for the rents and profits thereafter. *Dick v. Pitchford*, 1 *Dev. & Bat. Eq.* 480; *Palmer v. Stevens*, 15 *Gray* 343; see *Nixon v. Rose*, 12 *Gratt.* 425. So, where the bequest was in trust to pay the interest of a fund to the testator's wife for life, for the separate use of his wife and their children, to be applied for her and their maintenance, support, education, &c., the widow mortgaged her interest and became insolvent.—*Held*, that the trust was only for those children needing support, and a reference was ordered to ascertain how much of the income was necessary, the

Hardenburgh v. Blair.

for his son Charles. The bill states, that Charles is of full age and has a wife and child; that he is not prudent in the management of his affairs, and has, besides spending the liberal income which he has received from the bequest, become indebted to various persons in a very considerable sum of money in the aggregate; that numerous suits have been brought against him on account of such indebtedness, and that in some cases judgments have been recovered against him, which remain unpaid, and in other cases his creditors are proceeding to judgment on their claims against him. Upon proceedings under the act "respecting executions" (*Rev. p. 389*), upon one of the judgments, the defendant, John A. Blair, was appointed receiver of so much of the property and things in action belonging to, or due to, or

surplus to go to the mortgagee. *Carr v. Living*, 28 *Beav.* 644. In *New York*, by statute, such an interest is inalienable. *Van Epps v. Van Epps*, 9 *Paige* 237; *Brown v. Harris*, 25 *Barb.* 134; *Moulton v. de ma Carty*, 6 *Rob.* 533. At common law the estate of a *cestui que trust* for life is not forfeited by a conveyance of his interest. *Whestone v. St. Bury*, 2 *P. Wms.* 146; *Letbiuellier v. Tracy*, 3 *Atk.* 728; *Bazemore v. Davis*, 48 *Ga.* 339.

A devise to executors to hold certain property and its proceeds until the testator's sons should become free from debt, and then to make a division among them, does not convey such an interest as enables the sons to alien, or such as to subject it to the claims of their creditors. *Bank of State v. Forney*, 2 *Ired. (N. C.) Eq.* 181; see *Davidson v. Chalmers*, 33 *Beav.* 653; *Hall v. Gill*, 10 *Gill & Johns. (Md.)* 325; *Johnson v. Culbreath*, 19 *Ala.* 348; *Emery v. Van Syckel*, 2 *C. E. Gr.* 564; *Ashe v. Hale*, 5 *Ired. Eq.* 55.

The rule to be drawn from the cases where the trustees' discretion is absolute and uncontrolled is, that the interest of the *cestui que trust* in the estate or income can not be reached to satisfy his debts. *Holmes v. Penney*, 3 *K. & J.* 90; *Twopenny v. Peyton*, 10 *Sim.* 487; *Leavitt v. Beirne*, 21 *Conn.* 9; *Doswell v. Anderson*, 1 *Pat. & Heath* 185; *Keyser v. Mitchell*, 67 *Pa. St.* 473; *Nixon v. Rose*, 12 *Gratt.* 425; *Hall v. Williams*, 120 *Mass.* 344. The following are illustrations of what has been determined to constitute such discretion, or otherwise:

I. *Where the creditor has sought to subject to his claim the fund itself.*

Havens v. Healy, 15 *Barb.* 296. A trustee was to keep the share of J. in trust, and to pay it to him in small sums for the support of himself and family, or otherwise, as the trustee should decide, or for a home to be kept in trust for J. — *Held*, that J. took a beneficial interest in the fund itself, and not merely in the income; that such interest was assignable by J., would pass to bankrupt assignees, and could be reached by creditors' bill.

Hardenburgh v. Blair.

held in trust for, the debtor at the time of issuing the execution, or at any time afterwards, as will be sufficient to pay the judgment debt, with costs and interest, and the debtor was ordered to convey and deliver to the receiver all such property and rights in action, and the evidence thereof, according to the form of the statutes in such case made and provided. The complainants have in hand a considerable sum of money payable to Charles under the will, it being income derived from the \$250,000 given to them by the will in trust for him; and of this income they have enough in their hands, over and above the amount which they deem it prudent to pay to Charles, to satisfy the judgment, with costs and interest. The receiver claims so much of the last-mentioned money as will satisfy the judgment and costs

Learitt v. Beirne, 21 Conn. 9. B. gave to his sons, G. and O., property for the exclusive use and enjoyment of his daughter M. and her children, with full authority in G. and O. to apply the property as to them should seem best for their exclusive benefit, during the life of M., and afterwards to divide the same among her children. On a bill filed against the trustees by the payees of a note given by M.,—*Held*, that the fund was not bound by M.'s contracts, and that the trustees had the title and custody and authority to apply it according to their discretion, with which the court would not interfere until an abuse thereof should be shown. *Ellsworth & Church, JJ. dis.* See *Harper v. Phelps*, 21 Conn. 257.

Lucas v. Lockhart, 10 Sm. & Marsh. 466. A devise was made to a wife to have, during widowhood, the entire use, profit and control of the estate, "and to her discretion do I entrust the education and maintenance of my children during that time." — *Held*, that the widow took the estate coupled with a trust, and that, during the children's lives, it was not liable to sale to satisfy judgments against her.

White v. White, 30 Vt. 338. "I bequeath to my son W. * * * the sum of fifteen hundred dollars for the support of himself and family, and for no other purpose; to be paid and advanced by my executors, within five years after my decease, &c." The legacy was paid to the attorney of W.—*Held*, not attachable in the attorney's hands; following *Raikes v. Ward*, 1 Hare 445; *Crockett v. Crockett*, 1 Hare 451.

Doswell v. Anderson, 1 Pat. & Heath 185. M., by marriage settlement, conveyed lands and slaves in trust for her sole use for life, the profits to be applied to the support, maintenance and education of herself and her children, at her discretion. — *Held*, that the fund was not liable for her debts, contracted during or after coverture.

Johnson v. Ellis, 12 B. Mon. 479. Testator directed that the farm on which he lived, and all the residue &c., should be sold and the proceeds equally divided; the portion of his son O. * * * to remain in the hands of his executors, to be disposed of as they might think best for

Hardenburgh v. Blair.

and interest, and the complainants, being in doubt as to his right to it, or their authority to pay it, file their bill for direction.

The question presented is, whether, under the proceedings which have been had under the act respecting executions, the income in the hands of the trustees can be reached by the judgment creditor for the satisfaction of his debt. The debtor is entitled, under the will, to the annual interest of a quarter of a million of dollars. Imprudent in the management of his affairs, he not only expends this large income, but, though, as far as appears, he is not and has not been engaged in any business, and has but a small family, a wife and one child, he has run heavily in debt. That he

him and his heirs. — *Held*, that the executors' right does not impair the rights of creditors. If O. has an equitable right to the fund, it is subject to their claims.

Arnwine v. Carroll, 4 Hal. Ch. 620, 886. A.'s mother conveyed lands to C. (her grandson) in consideration of a lease to herself for life, and upon her death to pay to A. \$2,000, "in such sums and at such times as A. might require"; such sum being intended for the use and support of A., he being indebted to divers persons and of an improvident disposition. There was a failure to prove the trust, but the chancellor said (p. 625), "if any claim or right of action that could be enforced, either at law or in equity, was given to the complainant, his creditors could reach the fund arising from it". See *Battle v. Petway*, 5 Ired. Law 576; *Forbes v. Smith*, 8 Ired. Eq. 30; *Freeman v. Perry*, 2 Dev. Eq. 243.

Wells v. Ely, 3 Stock. 172. One-fifth of a residuum was bequeathed to E., wife of W., in trust for the use of W.; one-fifth to C., wife of H., in trust for the use of H.; and in case H. should die before J. and S. arrive at the age of twenty-one years, his share to be divided equally between testator's surviving children. — *Held*, that W.'s share was subject to his creditors' claims. Query, whether the interest on H.'s share was so liable.

Samuel v. Salter, 3 Met. (Ky.) 259. An estate was devised to a trustee "to use and control the same as he may think best, and out of the rents &c. furnish to testator's son, * * as he may need the same, such sums as may be sufficient for his reasonable and comfortable support during life—the overplus of the rents to be divided between the son's children, and, at his death, the estate that may remain to be equally divided between them." The trustee also had power to sell; the son to have no power to charge his maintenance with his debts, nor lay the funds under any liability; and "the said trustee is not restricted or limited to the actual profits of the estate." — *Held*, that the estate was liable for the son's debts. [Consult the Kentucky statute.]

Woodruff v. Johnson, 4 Hal. Ch. 120, 729. A lot and dwelling-house thereon were devised to trustees by O., in trust for his son S. for his

Hardenburgh v. Blair.

ought not to be protected in the enjoyment, free from liability for the payment of his debts, of a large income, of which he is the absolute owner, is almost too obvious for remark. As was said by Chancellor Walworth, in *Hallett v. Thompson*, 5 Paige 583: "As a general rule it is contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property, and to be able, at the same time, to keep it from his honest creditors."

The question is, whether the income may be reached for the payment of his debts by proceedings *in invitum*. If the debtor's interest in the income of the fund is alienable, it undoubtedly may be reached by his creditors. His inter-

occupation and enjoyment during life, and then to his wife for life on the same trust, then in trust to convey the fee to S.'s heirs at law. S. entered into possession, and, out of his own funds, erected another house upon the lot above devised.—*Held*, that such house was subject to his creditors' claims, but not the land whereon it stood, and the receiver was directed to ascertain the value of the ground rent, and to deduct that sum from the rents and appropriate it to the purposes of the trust.

Fisher v. Taylor, 2 Rawle 33. A testator directed his executors to purchase a tract of land to be conveyed to them in trust for his son, who was to have the rents, issues and profits thereof, but the same was not to be liable for any debts then or thereafter contracted by his said son, at whose death the land was to vest in the heirs of his body.—*Held*, that the interest of the son in the lands could not be taken in execution.

Vaux v. Parke, 7 W. & S. 19. Under a trust to pay the income &c. into J.'s hands, or to such persons as he might appoint, with power of devise in J., or to his heirs if intestate, with further power to the trustees and J. to alter and re-invest the fund,—*Held*, that J. had no estate liable to execution. See, also, *Ashhurst v. Given*, 5 W. & S. 323; *Shankland's Appeal* and other Pennsylvania cases, *supra* p. 43.

Upham v. Varney, 15 N. H. 462. That a trustee should permit the testator's brother to occupy lands and receive the income thereof during his life, and then to testator's nephew and his heirs, constitutes a use, executed in the *cestui que trust* by the statute of uses; and an execution would bind his legal estate therein. See *Hutchins v. Heywood*, 50 N. H. 491.

Verdin v. Slocum, 9 Hun 150. Trustees were to permit W., a son, to have, receive and take the rents &c. of one-third of an estate, for life, and then. "I give &c. the same share to the heirs at law of my said son."—*Held*, that the entire estate vested in the trustees, so that it was not necessary to make a judgment creditor of the son a party to foreclosure proceedings.

Hardenburgh v. Blair.

est in the income is absolute. It is to be paid to him, and, when paid to him, it is completely subject to his absolute disposal. The trustees have a discretion as to the times, manners and amounts, but that circumstance will not render the income inaccessible to creditors. Where property is given to A. for life, with a proviso, condition or limitation to determine his life interest in the event of his alienating or becoming bankrupt, and there is a clear gift over, during A.'s life, to other persons, in that case the proviso, condition or limitation is valid against the assignee or creditor of A. But where the limitation over is substantially a provision for A., whether through the instrumentality of a discretionary power in trustees or otherwise, it

Bryan v. Weems, 29 Ala. 423. The title of slaves conveyed to a trustee, his heirs &c. in trust for the sole and separate use of A for life, "and, after his death, for the use &c. of his children and their heirs forever," does not cease on A's death. See *Jones v. Strong*, 6 Ired. Law 337; *Bocon's Case*, 6 Phila. 335, 57 Pa. St. 504; *Creighton v. Pringle*, 3 Rich. (N. S.) 77; *Jones v. McNeil*, 1 Bail. 235; *Jones v. Cole*, 2 Bail. 330. CONTRA. *Aikin v. Smith*, 1 Sneed 304; *Staggers v. Matthews*, 13 Rich. Eq. 142; see *Westcott v. Edmunds*, 68 Pa. St. 34.

Hanson v. Graham, 6 Ves. 249. If an entire fund is given for the maintenance of children, they take the whole fund absolutely, and the maintenance is treated, in effect, as simply a motive; but if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose. See *Spencer v. Wilson*, L. R. (16 Eq.) 501.

Cope v. Wilnot, 1 Coll. 359, note. Trustees were directed to advance and pay "any sums of money they should think proper and convenient, not exceeding in the whole £3,000," for the use of the plaintiff for life. They advanced £1,000, and declined to advance any more. After the plaintiff attained his majority he filed a bill, and the court decreed to him the remaining £2,000.

Rowan v. Rowan, 2 Duv. 412. A devise of realty to trustees for the use of testator's sons for life, remainder to the sons' children in fee, with a provision that the trustees "may sell of the ground allotted to each of my children for their genteel (not extravagant) support, or to pay the debts of my sons, to any amount not exceeding \$10,000," gives the sons' creditors no right to subject any portion of the estate to the payment of their claims. See *Lowther v. Bentwick*, L. R. (19 Eq.) 166; *Talbot v. Marshfield*, L. R. (4 Eq.) 661; *Roosevelt v. Roosevelt*, 6 Hun 31.

Prescott v. Morse, 62 Me. 447. A bequest was made of a fund to be placed in the hands of the executor for the use and benefit of the legatee, as he might need it, he not to receive any more than was necessary for his benefit at the time. The legatee died before any part had been paid over.—*Held*, that his administrator could recover at law

Hardenburgh v. Blair.

will be invalid, and the assignee or creditor of A. will be entitled during his life. 1 *Roper on Legacies* 794.

In *Brandon v. Robinson*, 18 Ves. 429, where a testator directed that a share of his estate which he had by his will given to his son, or the produce thereof, should be laid out in the public funds, or in government securities, at interest, by and in the names of trustees, during the son's life, and that the dividends, interest and produce thereof, as the same might become due and payable, should be paid by them, from time to time, into his son's own proper hands, or on his own proper order and receipt, subscribed with his own proper hand, to the intent that the same should not be grantable, transferable or otherwise assignable by way of

the amount of the fund and interest from the executor. See *Dewart's Appeal*, 70 Pa. St. 403.

II. *Where the debtor is entitled to the sole enjoyment of the income or profits of a fund, during his life-time.*

Dick v. Pitchford, 1 Dev. & Bat. Eq. 480. A conveyance was made of land and slaves to trustees, on this trust, "annually to apply the rents and hire or other profits to the use and benefit of H. during his life, so that they be not subject to be sold or disposed of by him, or the rents and profits anticipated by him, or be in any manner subject to his debts or contracts; and after H.'s death, in trust for H.'s three sons."—*Held*, that the trustee had no discretion over the annual proceeds, and there being no forfeiture in case of H.'s conveyance for life, an assignment by him was good, and the assignee is entitled to the income during H.'s life and can call on the trustee to account, but that he has no right to the possession of the trust property, because of the ulterior trusts for H.'s sons.

Presley v. Rodgers, 24 Miss. 520. A deed of certain slaves was given to C. during life and then to her issue, and, in default of such issue, to the grantor's children. C. had issue, a son, who died before the slaves were attached for C.'s debt.—*Held*, that the title being in the trustees for C.'s use, and also for those in remainder, the slaves were not subject to attachment at law, but the plaintiff should proceed in equity.

Johnson v. Cushing, 15 N. H. 298. J. S. gave one-third of his estate to his executors in trust, to appropriate and pay over such part of the net income at such times and in such manner as they should judge proper for the maintenance of his son T., with power of devise in T., and on failure to devise, then over to T.'s heirs. T. devised the property, and died insolvent.—*Held*, that equity had jurisdiction for T.'s creditors, and they were entitled to the property in preference to T.'s appointee.

Hardenburgh v. Blair.

anticipation of any unreceived payment or payments thereof, or of any parts thereof; and that upon his son's decease the principal should, with the dividends, interest and produce, be paid and applied by the trustees to such persons as, in a course of administration, would become entitled to his son's personal estate, &c.; it was held that the son had an interest for life in the dividends assignable under a commission of bankruptcy, with a limitation over of the principal to those entitled under the statute of distributions. In that case it was remarked by Lord Eldon, in giving judgment, that if property be given to a man for his life, the donor can not take away the incidents to a life estate.

Brown v. Cleary, 1 Rich. Eq. 319. A judgment was obtained against a husband and wife for a debt of the latter, *dum sola*. The husband died insolvent. Afterwards a trust was created for the benefit of the wife, whereby the income of the fund was paid to her for life.—*Held*, that the judgment creditor might subject such income in the hands of the trustee to the satisfaction of his judgment. But see *Bryan v. Knickerbacker* 1 Barb. Ch. 409.

McIlwaine v. Smith, 42 Mo. 45. By a deed of trust, the trustee was to control and manage the property, to make loans and receive the rents and profits, to pay all the taxes and other expenses, and to pay over to the *cestui que trust*, at the end of each quarter, during his life, "the net product of said property," with remainders over, and power of appointment.—*Held*, that the trustees might be enjoined from paying over the quarterly income to the *cestui que trust*, and directed to apply it to satisfy a decree against him.

Hzath v. Bishop, 4 Rich. Eq. 46. J. B. conveyed to B. B. two slaves, in trust "to pay over to J. G. yearly, and from year to year, or as much oftener as necessary or convenient, the net profits and income from the labor or hire of said slaves, for the better support and maintenance of the said J. G.," with further disposition after the death of J. G.—*Held*, that J. G.'s interest in the slaves was liable in equity to the claims of his creditors.

Keyser v. Mitchell, 67 Pa. St. 473. Under a devise to trustees to collect rents &c., and to pay said income, or so much as the trustees may think proper for the support of C. during his life, either into his own hands or in such way as to the said trustees may seem best for his comfortable maintenance: such payments and disbursements to be at all times at their sole and absolute discretion,—*Held*, that the income was not liable to attachment under a judgment against the son.

Buckman v. Wolbert, 9 Phila. 207. Under a bequest: "In trust to pay the income to J. for his natural life, and that the same shall not, in any way, be liable for any present or future indebtedness of J., and upon his death, in future trust, to convey the fee to his children,"—*Held*, that the income payable to J. was not liable to execution by his creditors.

Hardenburgh v. Blair.

In *Rockford v. Hackman*, 9 *Hare* 475, Vice-Chancellor Turner remarked, on the authority of *Brandon v. Robinson* and *Graves v. Dolphin*, 1 *Sim.* 66, that property can not be given for life, any more than it can be given absolutely, without the power of alienation being incident to the gift.

In *Graves v. Dolphin*, a testator had given an annuity to his son for his personal support, not to be liable to his debts, and to be paid, from time to time, into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge. It was held that the annuity passed, on the son's bankruptcy, to his assignees. The vice-chancellor remarked, in pronouncing judgment, that the policy of the

Benton v. Pope, 5 *Humph.* 392. A gift of slaves to the donor's grandchildren, to have and to hold forever, the same to remain in the possession of their father for life, but not to be subject to his creditors or liable for the payment of his debts in any way whatever, gives the father an equitable usufruct not subject to his debts.

Hall v. Williams, 120 *Mass.* 344. A testator gave the net income of his residuary estate to his children or their issue, providing, further, that if any of them exhibited want of thrift or sound discretion, then the trustees were to pay such income in such way as to enure and be beneficial to such beneficiary's family, or to his education and support.—*Held*, that a creditor of one of the sons could not maintain a bill against the trustees and such son, to apply the future income to the payment of the debt. See *Palmer v. Stevens*, 15 *Gray* 343.

Unless otherwise specified in the trust, the profits or income accumulating on a fund given to the beneficiary for life belong to him, and are not to be added to the corpus of the fund (*Astope v. Goodall*, 53 *Ga.* 318; *Bazemore v. Davis*, 55 *Ga.* 504. See *Du Bose v. Carlisle*, 51 *Ala.* 590; *Staggers v. Matthews*, 13 *Rich. Eq.* 142); and such surplus is liable for his debts. *Bailie v. McWhorter*, 56 *Ga.* 183.

Pope v. Elliott, 8 *B. Mon. (Ky.)* 56. A father bequeathed \$25 per month to be disposed of or appropriated for the support of his son R., out of a trust fund in the executors' hands.—*Held*, that the chancellor could not order the whole or any part of such support (which, by the absence of R. from the state, had accumulated to \$225), to discharge a debt of R.'s, contracted before testator's death.

III. *Where the family or children of the cestui que trust are, by the provisions of the trust deed, entitled to enjoy the income or profits with him during his life-time.*

A bequest to A. of an annuity for the benefit of his wife and family during the life of A., does not include A. (if he disclaim) so that a judgment creditor can reach his interest. *Wallace v. McMicken*, 2 *Disney (Ohio)* 564. See *Kearsley v. Woodcock*, 3 *Hare* 185; *Whelan v. Reilly*, 3 *W. Va.* 597; *Bolles v. State Trust Co.*, 12 *C. E. Gr.* 308.

Gamble v. Dabney, 20 *Tex.* 69. On a trust to maintain the grantor's daughter and her children, free from her husband, and, after her

Hardenburgh v. Blair.

law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy.

In *Piercy v. Roberts*, 1 *Myl. & K.* 4, where a testator bequeathed a legacy of £400 to his executors in trust, to pay it to his son in such smaller or larger portions, at such time or times and in such way or manner as they should, in their judgment and discretion, think best; it was held, that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent.

In *Green v. Spicer*, 1 *Russ. & M.* 395, where trustees, under a will, had a discretion as to the manner of the application

death, to the sole use of her children.—*Held*, that the interest of the wife was not subject to execution at law, although the creditor may be entitled in equity to subject the surplus proceeds of the rents &c. to his debt.

Cole v. Littlefield, 35 *Me.* 439. A testator gave to a trustee all of his estate, to apply the income to his wife as she should require, for her support and that of their minor children, with further direction to the trustee to invest the surplus of the income for any year to make up any deficiency, and to be paid to the children, with their several portions, at maturity.—*Held*, that the wife may determine how much of the income is requisite for their support, and that the trustee must pay her the whole of it, if she so requests.

Loring v. Loring, 100 *Mass.* 340. On the following gift: "I give to my wife my personal property for her benefit and support, and the support of my son, whilst she remains unmarried,"—*Held*, that she took such property in trust during her widowhood, the income of one half to be applied for her own benefit and support, and that of the other half for the support of the son.

Chase v. Chase, 2 *Allen* 101. Under a will creating a trust fund, with directions to pay the income yearly to the testator's son, "for the support of himself and his family, and the education of his children," the wife and children can enforce, in equity, the due appropriation of part of the income for their benefit. See *Bridgen v. Gill*, 16 *Mass.* 522.

Rippon v. Norton, 2 *Beav.* 63. Property was settled on J., until he should take the benefit of the insolvent act, and then trustees were to apply it in such manner and to such persons, for the board, lodging and subsistence of J. and his family, as they should think proper. J.'s wife had died, leaving three children. After becoming an insolvent,—*Held*, that J.'s assignees were entitled to one-fourth of his life interest. [See 7 *Geo. IV.* c. 57.]

Page v. Way, 3 *Beav.* 20. Real and personal estate were conveyed to trustees to receive the rents and profits, and to pay and apply the

Hardenburgh v. Blair.

of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of the *cestui que trust* during his life, it was held that his interest passed to his assignees under the insolvent act, notwithstanding a proviso in the will that he should not have the power to sell, mortgage or anticipate the income of the fund.

In *Younghusband v. Gisborne*, 1 *Coll.* 400, where the trust was for the support, clothing and maintenance of an adult, it was held to be a trust for his benefit generally, and to devolve to his assignees under the insolvent act, notwithstanding a provision to the contrary in the will by which the trust was created.

same for the maintenance and support of the donor, his wife and children, if any; or to permit the rents &c. to be received by said donor during his life, but without power to anticipate or charge the same. * * * The donor became bankrupt. There was no issue of the marriage. — *Held*, that the trustees had a discretion to pay the donor the whole income, but that it was their duty to see that the wife was maintained; and a reference was made to ascertain what would be a proper allowance for the wife, the donor's assignees in bankruptcy to take the rest. See *Wetherell v. Wilson*, 1 *Keen* 80; *Kearsley v. Woodcock*, 3 *Hare* 185; *Carr v. Living*, 28 *Beav.* 644.

Wallace v. Anderson, 16 *Beav.* 533. By a settlement, trustees were, after the bankruptcy of the husband and the death of his wife, to pay the income "in such manner for the maintenance and support, or otherwise for the benefit of the husband and the issue, as they might think proper." — *Held*, that such discretion was not taken away by the bankruptcy of the husband and the death of the wife, so as to entitle the husband and the issue to take equally. After inquiry as to what had been properly applied for the maintenance of the issue, the assignees were declared entitled to the surplus.

Holmes v. Penny, 3 *K. & J.* 90. A voluntary settlement of a life interest, applicable to the maintenance of A., his wife and children, or any of them, at the uncontrolled discretion of the trustees, is valid, and the court can not apportion the income between A., his wife and children, so as to make A.'s part of it available for his creditors.

Twopenny v. Peyton, 10 *Sim.* 487. A direction to trustees to apply during the life of A. (a bankrupt and lunatic) the whole, or such part of the interest of the fund, at such times, in such proportions and in such manner, for his maintenance and support, and for no other purpose whatsoever, as they in their discretion should think most expedient, creates no interest to which his assignees in bankruptcy are entitled.

Wylie v. White, 10 *Rich. Eq.* 294. A testator bequeathed to his son W., during his natural life, the use and benefit of certain negroes, "but

Hardenburgh v. Blair.

In *Snowden v. Dales*, 6 Sim. 524, where A. assigned £800 to trustees, in trust, during the life of B., or during such part thereof as they should think proper, and at their will and pleasure, but not otherwise, or at such other time or times, and in such sum or sums, portion or portions, as they should judge proper and expedient, to allow and pay the interest of the £800 into the proper hands of B., or otherwise, if they should think fit, in procuring for him diet, lodging, wearing apparel and other necessities, but so that he should not have any right, title, claim or demand in or to such interest other than the trustees should, in their or his absolute and uncontrolled power, discretion and inclination, think proper or expedient, and so as no creditor of his

the said negroes not to be removed from the state, nor to be disposed of by him or any other person whatsoever, but to remain exclusively for the annual support of my said son and family."—*Held*, that while W.'s interest is not subject to sale under execution at law, it may be made liable in equity.

Loor v. Holges, *Speer's Eq.* 593. Under a trust to permit a husband, during the joint lives of himself and wife, to receive all the income to and for their own use and benefit, and after the husband's death to transfer the fund discharged of any trust to the wife, if she survive, or to her issue or next of kin,—*Held*, that the husband's interest could not be seized and sold under execution at law, because the trustees must have the title in order to carry out the trust after his death; nevertheless, equitable proceedings might be instituted to reach the husband's interest during life.

Rugely v. Robinson, 10 Ala. 702. A trust was given for the benefit of the donor's son E., not subject to the payment of any of his debts, nor should the profits of the trust be applied to such payments, but held for the use and benefit of E. and his family during E.'s life, and then to E.'s devisees or heirs at law.—*Held*, that the property intended to be used jointly by E. and his family, in specie, as the house, furniture, &c., cannot be severed or reached by creditors; *aliter*, as to any income in money &c. of which an account may be ordered, and E.'s share in the net product subjected to his debts.

Hill v. McRae, 27 Ala. 175, 182. Property was bequeathed to be held, used and managed by a trustee, who was also empowered with the assent of the *cestui que trust*, T., to sell the property and re-invest the proceeds on the same trust. The trustee was forbidden to pay any debts of T., and was directed to pay over to T., from time to time, such part of the income of the said trust estate (or the whole, if required,) as might be necessary for the comfortable and reasonable support of the said T., and of his wife and children, should he have any, the same to be used by the said T., with power of testamentary disposition in T., and, on failure thereof, to his next of kin. T. was

Hardenburgh v. Blair.

should or might have any lien or claim thereon in any case, or the same be in any way subject or liable to his debts, dispositions or engagements; and it was declared that, after his death, the £800 and all savings and accumulations of interest, if any, should be in trust for his children, and if he should have no child, then in trust for C.; it was held, A. having become bankrupt, that his life interest (the trustees had paid him down to his bankruptcy) passed to his assignees.

In *Hallett v. Thompson*, 5 *Paige* 583, where a legacy was bequeathed absolutely to the legatee, but by the will the executors were directed to retain it in their hands, and put it on interest, and pay the annual interest to the legatee for

unmarried at the time of the testator's death, but married afterwards, and his wife survived him.—*Held*, that his wife took a joint interest with him in such portion of the income as was necessary for their comfortable and reasonable support, and that no portion of the income could be subjected, in equity, to T.'s creditors.

Roberts v. Hall, 35 *Vt.* 28. A farm, with the stock, was devised in trust for G. and his wife and children during the lives of G. and his wife, and then to be divided equally among the children; and that the trustees might permit G. to have the management of the property so long as, from his habits &c., they should think it safe and prudent so to do.—*Held*, that absolute ownership could not be inferred from the occupation of the farm and use of the stock &c. by G., for the benefit of his family, and that stock raised by G. from that devised was not subject to his debts. See *Whitcomb v. Cardell*, 42 *Vt.* 24; *Brown v. Williamson*, 36 *Pa. St.* 338.

Nickell v. Handly, 10 *Gratt.* 336. A trustee was directed so to use and conduct a farm, &c., as to be most advantageous to the interest and support of H. and her five children during her life-time. Judgments were afterwards recovered against H., and after her discharge as an insolvent debtor, a creditors' bill was filed.—*Held*, that one equal sixth part of the trust property, or its annual product, could not be set apart for H. and each of her children, but the trustee must retain the whole and apply it to their support according to their several necessities; and that the creditors would only be entitled to H.'s ratable proportion of the surplus of the annual product remaining after the support of all of them had been provided for. See *Coutts v. Walker*, 2 *Leigh* 268; *Armstrong v. Pitts*, 13 *Gratt.* 235.

On a judgment for a debt contracted after a solvent debtor had transferred all his estate to trustees, "the interest to be appropriated to the maintenance and use of his family and himself during their lives," the court ordered the annual value of the debtor's interest to be ascertained, and decreed that the trustee pay the debt when in funds. *Cosby v. Ferguson*, 3 *J. J. Marsh.* 264; *Kempton v. Hallowell*, 24 *Ga.* 52;

Hardenburgh v. Blair.

life, unless he should, by a legal written instrument, require the payment of the principal of the legacy to himself, in which case the whole was to be paid to him, with the power to the legatee to dispose of the legacy by will if he did not receive it in his life-time, and to be paid to his heirs if he did not receive it himself or dispose of it by his will at his death; and the testatrix, by the will, declared that neither the legacy nor the interest thereof should be liable to any of the creditors of the legatee for the payment of his debts; it was held that the absolute power of the legatee to compel a payment of the legacy to himself was such a beneficial power as would pass to his assignees under the title of the revised statutes of New York relative to the assignment of

Rice v. Burnett, *Speer's Eq.* 579; *Jones v. Fort*, 1 *Rich. Eq.* 50; *Creighton v. Clifford*, 6 *Rich. (N. S.)* 188; but see *McLaurine v. Monroe*, 30 *Mo.* 462.

Under such a settlement, debts of the husband cannot be charged on the prospective profits or income. *Markham v. Guerrant*, 4 *Leigh* 279.

The statutes of the several states authorizing a sale or sequestration of the interest of a *cestui que trust*, only apply to cases where the *cestui que trust* holds the estate or income solely, and are construed strictly. *Harrison v. Battle*, 1 *Dev. Eq.* 541; *Lynch v. Utica Ins. Co.*, 18 *Wend.* 236; *Bogart v. Perry*, 17 *Johns.* 351; *Ontario Bank v. Root*, 3 *Paige* 478; *McGee v. Hussey*, 5 *Ired. (N. C.) Law* 255; *Anderson v. Briscoe*, 12 *Bush* 344; *Stewart v. McMartin*, 5 *Barb.* 438; see, also, *Donalds v. Plumb*, 8 *Conn.* 447; *Blanchard v. Taylor*, 7 *B. Mon.* 645; *Samuel v. Sutter*, 3 *Metc. (Ky.)* 259; *Bachelor v. Thompson*, 41 *Me.* 539; *Bridgman v. McKissick*, 15 *Iowa* 260; *Ling v. Ropke*, 5 *Sandf.* 363; *Brown v. Harris*, 25 *Barb.* 134; *Brown v. Tucker*, 47 *Ga.* 485; *Matthews v. McPherson*, 65 *N. C.* 189; *Campbell v. Foster*, 35 *N. Y.* 361; *Roosevelt v. Roosevelt*, 6 *Hun* 31; *Wetmore v. Trislow*, 51 *N. Y.* 338.

In construing such statutes strictly, the English decisions on 29 *Car. II.* c. 3, § 10, are followed. See *Doe, Hull v. Greenhill*, 4 *B. & Ald.* 684; *Finch v. Earl of Winchelsea*, 1 *P. Wms.* 277; *Forth v. Duke of Norfolk*, 4 *Madd.* 503.

Clute v. Bool, 8 *Paige* 83. A direction to executors to set apart a fund sufficient to raise an annuity to be paid to a son for life in quarter-yearly payments, and the principal to his issue &c., creates such a fund as cannot be reached by creditors' bill against the son, before the quarterly payments become due; nor would it pass to an assignee in insolvency. [See further, for application of statute of New York to this case.] Also, *Degraw v. Clason*, 11 *Paige* 136; *Scott v. Nevins*, 6 *Duer* 672; *Markham v. Guerrant*, 4 *Leigh* 279.

Rider v. Mason, 4 *Sand. Ch.* 351, 2 *Barb. Ch.* 79. Under the New York statute, the surplus of an annuity for life, payable to A. half-yearly out of the income of an estate devised to trustees, beyond what is necessary for his support, is liable for his debts. *Miller v. Miller*, 1 *Abb.*

Hardenburgh v. Blair.

the estates of non-residents, absconding, insolvent or imprisoned debtors, and that the legacy might be reached by a creditors' bill, and applied in satisfaction of a judgment against the legatee. See, also, *Ames v. Clark*, 106 *Mass.* 573; *Story's Eq. Juris.* § 974a.

In *Degraw v. Clason*, 11 *Paige* 136, the same chancellor (Walworth) referred to the case of *Hallett v. Thompson*, with approval, as having decided that the thirty-eighth section of the article of the revised statutes of New York relative to the court of chancery, which, in authorizing proceedings for discovery in equity, with a view to satisfaction of a judgment at law, accepts the case "where the trust has been created by, or the fund held in trust has proceeded

New Cas. 30, 7 *Hun* 208; *Parker v. Harrison*, 10 *Jones & Spen.* 150; *Moulton v. de ma Carty*, 6 *Rob.* 533.

Genet v. Foster, 18 *How. Pr.* 50. Whether the whole income of a fund is necessary for the support of an annuitant, and whether any part of such income should be applied to satisfy a judgment, can not be determined by supplementary proceedings on an execution and the appointment of a receiver by the judgment creditor. The judgment debtor and trustees must be made parties. See *Scott v. Nevius*, 6 *Duer* 672; *Locke v. Mabbett*, 2 *Keyes* 457, 3 *Abb. Ap.* 68; *Brown v. Tucker*, 47 *Ga.* 485.

Scott v. Nevius, 6 *Duer* 672. A reference may be ordered to ascertain and fix the amount necessary for an annuitant's support, and the trustees be directed to pay over the surplus for the satisfaction of a judgment creditor. See *Bramhall v. Ferris*, 14 *N. Y.* 41.

Hann v. Van Voorhis, 15 *Abb. Pr. (N. S.)* 79, 5 *Hun* 425. An action to reach a surplus, arising upon a trust for the benefit of a debtor, can not be commenced before such surplus has accumulated. An injunction will not lie against the trustees, to restrain them from expending more than is necessary for the support &c. of the *cestui que trust*. See *Graff v. Bonnett*, 25 *How. Pr.* 470, 2 *Rob.* 54, 31 *N. Y.* 9.

The creditors must show the existence of a surplus. *Graff v. Bonnett*, 31 *N. Y.* 9; *Nickell v. Handly*, 10 *Gratt.* 336.

In determining what is a reasonable sum for the support of a *cestui que trust*, as provided by statute, the referee may take into consideration his situation in life and the condition in which he was left by the donor. *Genet v. Beekman*, 45 *Barb.* 382; *Moulton v. de ma Carty*, 6 *Rob.* 533.

Independently of any statute, the remedy of a creditor, in such case, must be sought in chancery. *Low v. Marco*, 53 *Me.* 45; *Gamble v. Dabney*, 20 *Tex.* 69; *Heath v. Bishop*, 4 *Rich. Eq.* 46; *Presley v. Rodgers*, 24 *Miss.* 520; *Johnson v. Cushing*, 15 *N. H.* 298.

For illustrations of cases where chancery has sometimes controlled the discretion of an executor or trustee, see *Clark v. Parker*, 19 *Ves.* 1;

Hardenburgh v. Blair.

from, some other than the debtor himself," was only intended to exempt the beneficial interest of the *cestui que trust* in those cases where he himself could not voluntarily alien his interest in the trust property, and that in those cases a general assignment to the receiver would not convey to him an interest in a trust for the receipt of the rents and profits of lands, or of the interest or income of personal estate for the use of a *cestui que trust*, which, by law, is inalienable by the assignor. Nor does it seem to be questionable whether the income can be reached through proceedings under the act respecting executions. The power given by that act to sue for and apply the property and things in action of the debtor to the payment of the judgment will enable the creditor to reach the income in the hands of the trustees. *Miller v. Mackenzie*, 2 Stew. 291. Referring to that statute, the court in that case said: "Defining the effect of his appointment, the act says that he 'thereby shall receive authority to possess, receive, and, if need be, in his own name, as such receiver, sue for such property and things in action.' These terms are quite comprehensive, and, the statute being a remedial one, it would seem illegitimate to limit their effect, unless compelled to such course by very cogent considerations. The right to sue here given must comprehend the right to call for aid on the court of equity, as well as to ask it of a court of law; otherwise, purely equitable assets, although discovered, would be beyond the reach of the receiver." The proceedings in this court by the receiver, under an assignment from the debtor, or under the power conferred on him by the statute alone, will not be affected or embarrassed by the question of jurisdiction raised and decided in *Whitney v. Robbins*, 2 C. E. Gr. 360, and *Frazier v. Barnum*, 4 C. E. Gr. 316.

Norcom v. D'O'Eucl, 17 Mo. 98; *Brock v. Sawyer*, 39 N. H. 547; *Rudland v. Crozier*, 3 DeG. & J. 143; *Walker v. Walker*, 5 Madd. 424. Also, *Smith v. Wildman*, 37 Conn. 384; *Sanderson's Trusts*, 3 K. & J. 497; *Edgeworth v. Edgeworth*, Beat. 328; *Mahon v. Savage*, 1 Sch. & Lef. 111, 114; *Drew v. Wakefield*, 54 Me. 291. — REP.

Fitzgerald's Case.Leveridge v. Marsh.

In the matter of the alleged lunacy of JAMES G. FITZGERALD, of the county of Mercer.

The return of an inquisition in lunacy set aside and a new commission ordered, after a personal examination of the lunatic.

Motion to set aside inquisition.

Mr. J. K. Wells, for the motion.

THE CHANCELLOR.

The return in this case is that Mr. Fitzgerald "is not a lunatic and of unsound mind so far that he is unfit for the government of himself and of his property;" that is, though he is a lunatic and of unsound mind, he is not so to such a degree as, in the opinion of the jury, to incapacitate him for the management of himself and his estate. He is the subject of insane delusions, and, in the opinion of several competent and expert medical witnesses who have had excellent opportunities to observe him, is so insane as to be unfit to manage himself or his affairs. Having personally examined him, I am unwilling to let the inquisition stand. It will be set aside and a new commission ordered.

JOHN H. LEVERIDGE

v.

CHARLES MARSH and others.

After a bill to foreclose a mortgage has been filed, subsequent encumbrancers may be made parties by filing a petition, instead of a supplemental bill.

Bill to foreclose. Petition of Oscar Marsh and others to be made parties.

Leveridge v. Marsh.

Mr. W. P. Wilson and *Mr. W. H. Corbin*, for petitioners.

Mr. E. B. Williamson, for complainant.

THE CHANCELLOR.

The right of the petitioners to be made parties defendant to this suit, is admitted. The only question is as to the practice. The complainant's counsel insists that the application must be made by supplemental bill. The chancery act (*Rev. p. 110, § 41*) provides that where any person acquires an interest in the subject matter of the suit *pendente lite*, it shall not be necessary for him to file a supplemental bill to make himself a party, but it shall be done by petition. The same act (*Rev. p. 118, § 78*) provides that any person having an interest in mortgaged premises or property by or through any conveyance, mortgage, assignment or lien, or any instrument which, by any provision of law, could be recorded, registered, entered or filed in any public office of this state, but which shall not be so recorded, registered, entered or filed when suit for foreclosure of mortgage on the premises is commenced, may, on causing such conveyance, mortgage, assignment, lien, claim or other instrument to be recorded, registered, entered or filed as provided by law, cause himself to be made a party to the suit by petition. It has been held that a person who obtained an interest in the mortgaged premises by deed after the beginning of the suit, but could not cause the deed to be recorded because it was withheld from him, was entitled to the benefit of this latter section. *Kirkland's adm'r v. Kirkland*, 11 C. E. Gr. 276. In *Conrad v. Mullison*, 9 C. E. Gr. 65, a mortgagor was made a party on his petition to enable him to set up a claim of subrogation. See, also, *Melick v. Melick's ex'r*, 2 C. E. Gr. 156. The practice of applying to be made a party defendant by petition instead of by supplemental bill, is specially authorized by the statute in certain cases, and it has, in the practice of the court, been recognized in others. There is no reason why it should not be allowed in the case in hand. It has

Probasco v. Probasco.

the advantage of being more economical, convenient and speedy, while it is equally efficacious. The petitioners are necessary parties, being subsequent encumbrancers. *Vanderveer v. Holcomb*, 2 C. E. Gr. 87; *Gould v. Wheeler*, 1 Stew. 541. As such they should be made parties, and their mode of application by petition is unobjectionable.

ALEXANDER PROBASCO, SR.,

v.

ALEXANDER PROBASCO, JR., and others.

An attachment for violating an injunction granted on a bill to set aside a transfer of defendant's property, alleged to have been made by duress, refused, the proof not being satisfactory that the mortgage, which the defendant had collected, was included in the transfer.

Bill for relief. On order to show cause why the defendant, Alexander Probasco, Jr., should not be attached for contempt, for a violation of the injunction.

Mr. R. S. Kuhl and *Mr. J. N. Voorhees*, for the motion.

Mr. G. A. Allen, contra.

THE CHANCELLOR.

The motion for an attachment is made upon two grounds: one, the collection of rents of the real estate, and the other, the collection of the principal and interest of a bond given in June, 1873, by William E. Hoffman to Alexander Probasco, Sr., for \$2,000 and interest. The suit is brought to set aside two instruments of writing signed by the complainant, by one of which he transferred to his children, of whom the defendant, Alexander Probasco, Jr., is one, all his real

Probasco v. Probasco.

estate subject to certain payments, and by the other he transferred to them all his personal property.

As far as the collection of the rents of the real estate is concerned, the motion is not pressed, it appearing that the acts complained of were done under an arrangement entered into before the court, pending an application for a receiver in the case, by which the solicitor of the defendants was, for the protection of all parties, to collect and hold the rents until the further order of the court.

As to the collection of the money secured by the Hoffman mortgage: In proceedings for contempt for the breach of an injunction, the court will not punish unless the guilt of the defendant be clearly established. *Magennis v. Parkhurst*, 3 Gr. Ch. 433. While, in the case in hand, the injunction is in its terms broad enough to cover the act complained of, provided the bond and mortgage were the property of the complainant, and were of the securities which were taken from his possession, as alleged in the bill, it not only does not appear that the complainant ever had them in his possession, but it appears affirmatively that they were always in the possession of his son Alexander. Again, it appears that the mortgagor and the lawyer by whom the bond and mortgage were drawn, understood that the obligee and mortgagee, Alexander Probasco, therein named, was Alexander Probasco, Jr., and that the loan which those instruments were made to secure, was made by him. A note for \$500, of the same date as the mortgage and purporting to have been given by Alexander Probasco, Jr., to his father, is produced, and there is evidence that the money for which it was given was borrowed from the complainant by Alexander to enable the latter to make up the amount of the loan to Hoffman, and the proof is that that note was paid. The complainant's testimony on the subject is by no means trustworthy, because of his want of recollection. He says that his memory is almost gone, but even he testifies that Alexander lent part of the money secured by the bond and mortgage. It is unnecessary to speak further of the evi-

Probasco v. Probasco.

dence. It is enough to say that it does not appear that the bond and mortgage were ever the property of the complainant.

The motion for an attachment is denied, with costs.

ALEXANDER PROBASCO, SR.,

v.

ALEXANDER PROBASCO, JR., and others.

1. On a bill to set aside a transfer of property, alleged to have been obtained by duress, persons in whose favor certain charges on the lands thereby conveyed were made, are necessary parties.

2. A bill which alleges that a feeble old man has, without consideration, transferred to his children all of his property amounting to \$45,000, reserving to himself only an annuity of \$1,200, inadequately secured, and without any provision whatever for his wife in case she survive him; and that such transfer was obtained from him by want of comprehension on his part, and duress and false representations as to its effect on the part of his children, shows sufficient equity, and will, therefore, be sustained on general demurrer.

Bill for relief. On general demurrer.

Mr. G. A. Allen, for the demurrer.

Mr. R. S. Kuhl, contra.

THE CHANCELLOR.

The complainant, a man of seventy-three years of age, brings this suit against his two sons and his daughter and the husband of the latter, to set aside two instruments made by him, as he alleges, under duress on their part, by which he conveyed to his children all his property (of the value of about \$45,000) consisting of houses and lands, bonds and

Probasco v. Probasco.

mortgages, bank stocks, &c., and including even his household furniture, reserving to himself only the use of one of the houses for life and an annuity of \$1,200 charged on the real estate. The conveyance of the real estate (of the value of about \$10,000) was made subject to the payment of \$2,500 to each of two of his grandchildren, in three months after his decease (the provision defeasible, however, in case of their death without issue), and subject also to the payment, within the same time, of \$150 to two other persons, \$100 to one and \$50 to the other. The personal property (of the value of about \$35,000) was subjected to no charge whatever. The circumstances as related in the bill, are: That in January, 1878, the complainant—whose wife, the mother of his children, had died—remarried. Immediately after his remarriage, two of the defendants, his son Alexander and his daughter Mary, began to talk to him in regard to his property, alleging, among other things, that his wife would in a few years spend it all, and leave him penniless in his old age. A day or two after his second marriage, his son Alexander came to his house in company with another man (the complainant's wife was temporarily absent), and, in an imperative, harsh and overbearing manner, demanded that he deliver up all his papers, his bonds, notes and other evidences of debt. This he refused to do. Alexander then attempted to take them by force, but was unsuccessful. He and his companion then went to his house, which was near, and soon after returned, and, by threats and actual violence, compelled the complainant's wife, who was then at home, to produce the papers. She delivered them into the complainant's hands, and they were at once taken from him by Alexander, the complainant being unable, from extreme age and feebleness, effectually to resist, and he and his wife being wholly without assistance. Alexander then took the papers, which were all of the complainant's bonds, notes and other securities and evidences of debt, and since that time the complainant has not been able to regain possession of any of them, or to obtain any information in regard to them.

Probasco v. Probasco.

On the day following, Alexander again came to the complainant's house, and requested him to accompany him to his (Alexander's) house, to sign papers relating to a transfer of the property, and not only demanded that he should go, but forbade that his wife should accompany him. The complainant refused to go unless his wife should be permitted to go with him. The permission having been granted, he went to Alexander's house, his wife supporting him on one side and Alexander on the other. When he arrived he found there two lawyers, his daughter and her husband, and another person. Alexander immediately requested the complainant's wife to leave the room, and, on her refusal, forcibly ejected and excluded her. There were then read over to him two instruments of writing, which had been previously prepared, and he was requested to sign them. On his hesitating to do so, because he did not fully understand them, although they had been read to him, he was told that his wife was a spendthrift, and that unless he signed those instruments she would spend all his property and leave him without means of support; and he was then told that if he signed them the property would still remain entirely his own, and the only effect of the instruments would be to prevent his wife from spending his estate.

The bill further states that, under misapprehension as to their legal effect, and induced by the statements and promises made to him by his son Alexander and his son-in-law and the other persons present, and the apprehensions which had been excited in him there, he signed the instruments; and that he was then too feeble to write his name, and was therefore directed to sign with his mark, which he did accordingly. It further states that he was induced to give up his papers and to sign those instruments through the duress to which he was then subjected, and that he was deceived and misled as to the purport and real character and effect of the instruments, not only as to his right to retain the control and management of his property, but as to their effect upon the rights of his wife in his property

Probasco v. Probasco.

after his decease, he having been distinctly told that his property would be distributed after his death in the same manner as if those instruments had not been signed, and that their effect would be to prevent his wife from spending his estate during his life.

From the statements of the bill, it appears that a very large part of his notes, bonds, stocks, &c. thus obtained from him, has been converted into cash and divided among his children, and the proceeds either spent by them in paying their debts or invested for their own benefit; that they have had, ever since the instruments were executed, the control of all his real estate except the village house and lot in which he lives; that they have refused to pay him the money charged upon the property for his benefit by the instrument by which the real estate was transferred to them, and that he has not only been unable to obtain the necessaries of life (his requests for money having been answered by harsh refusals), but he has been compelled to apply to the overseer of the poor, as a pauper, for the means of support. The bill prays that the instruments may be set aside, and that the property taken from him, under them, may be restored to him or duly accounted for.

The grounds of demurrer are, want of equity and non-joinder of necessary parties. On the statements of the bill (which, on demurrer, are taken to be true), there can be no doubt as to the complainant's equity. He appears to have been a very feeble old man, and to have executed, at the instance of his children, and without any consideration whatever, a conveyance of all his property to them (one of them resided, and still does, in the distant state of California), reserving to himself only a charge of \$1,200 a year on the real estate (which is of the value of about \$10,000 only, and part of which he must necessarily occupy), with no security for the payment except such as is afforded by the real estate itself, and leaving his wife, whom he had just married, without any provision whatever in case she should survive him. He alleges duress of threats and of

Danner v. Danner.

force, and not only want of comprehension, on his part, of the contents of the instruments, but false representations as to their effect by those who were to be benefited by them.

The grandchildren and the two other persons in whose favor charges are made in the deed for the real estate, are necessary parties to this suit. The demurrer will, therefore, be sustained, on the ground of non-joinder, but the complainant will be permitted to amend by adding the necessary parties, on payment of the costs of the demurrer.

HANNAH M. DANNER

v.

FREDERICK DANNER.

A testator gave to his wife \$5,000, to his son \$1,000, and to A. and B. other legacies, and the income, use and profits of all the residue to his wife for life, with remainder to his son, subject to the payment of a legacy of \$1,000 to his daughter. He appointed his wife and M. executors. They proved the will, settled the estate, and had their final account passed. There remained about \$13,000 of personalty, subject to \$1,000 advanced by the widow to pay the debts of the estate, and real estate worth \$13,000. The complainant (the widow) files her bill to set aside a conveyance of her life interest in the real estate, made to her son by means of his importunity, deceit and duress, and also to have returned to her custody and accounted for, the personalty of which he has also taken possession.—*Held*, on demurrer to the bill—

- (1) That the bill is not multifarious.
- (2) That M. (the co-executor) is not a necessary party, the estate being settled and the executors' final account passed.
- (3) That A. and B. and the daughter are not necessary parties, the remedy of the former, if their legacies are unpaid, being against the executors, and that of the daughter being against the son, whose estate in remainder is charged therewith.

Bill for relief. On general demurrer.

Danner v. Danner.

Mr. S. H. Pennington, for the demurrer.

Mr. John Whitehead, *contra*.

THE CHANCELLOR.

According to the bill, Frederick Danner, late of Newark, husband of the complainant and father of the defendant, died on or about the 7th of September, 1874. By his will he gave to the complainant \$5,000, and to the defendant \$1,000, and to other persons two other legacies amounting together to \$225, and gave the income, use and profits of all the residue of his estate to the complainant for life, with remainder to the defendant, subject to the payment of a legacy of \$1,000 to the testator's daughter. He appointed the complainant and Peter M. Melick executors of his will. It was duly proved by them in September, 1875; and the estate was afterwards duly settled, and their accounts passed by the orphans court of the county of Essex. After the settlement there remained a surplus of the personal estate of about \$13,000.

The bill further states, that the complainant advanced to her co-executor, of her own money, about \$1,000, which was used in the settlement of the estate in paying the demands which were against it; that the testator left productive real estate in Newark of the value of at least \$12,000; that after the estate had been settled, the defendant, who is the complainant's son, took into his possession all the surplus of the personal estate, and, by his importunities (the complainant was then sixty-five years old) and his promise to provide her with food, clothing and lodging during her life-time, induced her to convey to him her life estate in the real estate of which the testator died seized, and she did so by deed dated in April, 1876; that the conveyance was without other consideration than his promise to supply her wants for life; that at the time of making that conveyance, he, in order to secure to her the legacy of \$5,000 given to her by the will, and the money advanced by her for the set-

Danner v. Danner.

tlement of the estate, which had never been repaid to her, executed and delivered to her his bond and a mortgage of the same date with the deed, and upon the real estate before mentioned, for the sum of \$6,000, payable in five years with interest; that she left those papers with her lawyer, in order that he might have the mortgage recorded and afterwards retain it, with the bond, in his custody, for her; that afterwards, by false and fraudulent representations, the defendant obtained possession of those papers, promising to take care of them for her, and then, fraudulently and without her knowledge or consent, and without having paid her any of the money secured thereby, caused the mortgage to be cancelled of record; that he has refused to support her and driven her out of the house in which she resided (which was one of the houses owned by her husband, the testator, at his death), so that she is dependent on charity for her support, while her son is in the enjoyment of the entire estate.

The bill prays that the deed may be set aside as having been obtained by fraud; that the defendant may be decreed to pay to the complainant the \$6,000, secured by the bond and mortgage, with the interest thereon, and that in default thereof, his interest in the real estate, under the will, may be sold to raise and pay that money to her; that he may be required to account to her for the surplus of the personal estate, and the income thereof, since it has been in his hands, and the rents of the real estate since he has had possession of it, and that he may be required to pay her what shall appear to be due her on such accounting. It also prays an injunction and general relief.

The defendant demurs to the bill for multifariousness, non-joinder of the complainant's co-executor and the legatees, other than the complainant and defendant, named in the will, and for want of certainty in important statements.

The bill alleges, substantially, that the estate of the testator was settled, and the accounts of the executors duly passed

Danner v. Danner.

in the orphans court of the proper county, and that there remained a surplus of about \$13,000; that the complainant's legacy of \$5,000 had not been paid; that the defendant took that surplus into his possession, giving to the complainant security, by bond and mortgage, for the payment of that legacy and the amount which she had advanced of her own money for the payment of the debts of the estate; that the defendant, by fraud, obtained a conveyance of the complainant's life estate in the real property; that he, subsequently, fraudulently possessed himself of the bond and mortgage, and caused the latter to be cancelled of record; and it prays relief, as between the complainant and the defendant, in the premises.

The matters in respect of which the relief is sought are all connected together. The defendant has, by fraud, obtained and withholds from the complainant all her interest in her husband's estate, and the suit is brought to obtain redress for that grievance. There is no ground for the objection that the bill is multifarious. The complainant's co-executor has no interest in the controversy. The estate has been settled and his accounts have been passed. The surplus has been ascertained. By the will, the complainant is entitled to the use of it for her life-time, and she is seeking it as against the defendant, who has obtained and is holding it without right. In regard to the rents of the real estate which have been received by him, the complainant's co-executor, of course, could have no claim to or interest in them.

Nor have the legatees, other than the parties to this suit, any interest in this controversy for the surplus of the estate. If those to whom the legacies before mentioned, amounting together to \$225, were given, have not received them, they have their remedy against the executors. As to the other legatee, her legacy is charged upon the remainder in the real estate given to the defendant, and is, by the will, made payable by him. Her interest cannot be affected in or by this suit, and she has no interest in this controversy.

Miller v. Sauerbier.

The material statements of the bill are made with sufficient certainty of averment.

The demurrer will be overruled, with costs.

ELIAS N. MILLER, trustee,

v.

HENRY SAUERBIER and others.

A father, pending a compromise with his creditors, which included a mortgage on his homestead, gave a prior mortgage thereon to his daughter, to secure to her moneys alleged to have been advanced by her, and also for her services rendered in his family. The proofs as to the character of the loans and services, and also as to her *bona fides*, being unsatisfactory and contradictory, her mortgage was postponed to that of the creditors.

Bill for relief. On final hearing on pleadings and proofs.

Mr. A. Q. Keasbey, for the complainant.

Mr. C. Borchertling, Jr., for the defendants.

THE CHANCELLOR.

This is a controversy between the holders of the second and third mortgages over surplus money, the proceeds of the sale of the mortgaged premises under foreclosure proceedings on the first mortgage. The second mortgage is held by Mrs. Kirchner, the daughter of the mortgagor, Henry Sauerbier, to whom it was given in November, 1874 (it bears date on the 23d of that month), and the third, dated on the 3d of December following, is held by Elias N. Miller, trustee, to whom it was given by Sauerbier, in trust for the creditors of the firm of William Bohler & Co., of which Sauerbier was a member. Miller insists that the

Miller v. Sauerbier.

mortgage of Mrs. Kirchner is fraudulent as against the claims the payment of which his was given to secure, and that his mortgage is, therefore, entitled to priority over it. The master to whom the matter was referred, reported in favor of Mrs. Kirchner's mortgage. Miller excepted to the report, and the question between the parties is presented upon the exceptions.

The mortgage of Mrs. Kirchner was given under circumstances which, of themselves, challenge scrutiny and provoke suspicion. Her father had failed in business and was, at the very time when he gave her mortgage (which was for the sum of \$7,000 and interest), engaged in the endeavor to secure a settlement with his creditors. On the 27th day of November, 1874, four days after the execution of her mortgage, he sent to his creditors a proposition for the settlement of their claims against him, which involved the giving of a mortgage, as security to them, on the premises covered by her mortgage. These premises were his homestead property. Negotiations for a settlement had been pending between him and them for some time previous to that date and prior to the time of the giving of the mortgage to Mrs. Kirchner. He made no mention of this mortgage to his creditors or their attorney, and, in fact, obtained a settlement from them through their ignorance of its existence, which he otherwise could not have obtained. Had they known of its existence, they would have proceeded against him in bankruptcy. During the negotiations for a settlement, the mortgage of the complainant was spoken of as the only mortgage on the property. Before the time when the mortgage to Mrs. Kirchner was given, and at an early stage of the negotiations, a search had been made or obtained by the attorney of the creditors as to the encumbrances on the property, which disclosed no mortgage except the complainant's, which was, in fact, then the only one upon it. No search was made afterwards, because of the reliance which was placed upon the good faith of Sauerbier. That during these negotiations, and but four days before the

Miller v. Sauerbier.

presentation to his creditors of his formal proposition for settlement, which, as before stated, embraced (and it appears to have been a very important element therein) the giving of a mortgage, as security to his creditors, upon his homestead, he should have given to his daughter a mortgage upon the property for \$7,000 to secure loans made by her to him, as they allege, about three years before that time, and for which she neither had nor ever had had any security; nor had she even had any evidence of the debt and money which, as she says, he agreed to pay her for services rendered by her in his family before she was married, part of them while she was yet a minor, is, of itself, sufficient to urge to scrutiny and excite distrust. Of the amount which Mrs. Kirchner's mortgage was made to secure, \$3,300 are alleged to have been for money borrowed by her father from her shortly after she was married (she was married February 16th, 1871, and the mortgage is dated November 23d, 1874), and the rest, \$3,700, is alleged to be for her compensation for her services in his household while she was unmarried. Up to the time when she, as she alleges, made application to her father for the return of the money lent, she had never asked him for it. Why she applied to him for payment at that time, when he was in negotiation with his creditors for a settlement of their claims against him, does not appear. She gives no reason at all for seeking payment. She says she did not know, before that time, of his embarrassment. She further states that, when she asked him for the money, he said he could not pay her, but would "give her a paper for it," and that he then gave her the mortgage. Although she only asked for the money lent, \$3,300, he gave her a mortgage for \$7,000. She says, indeed, that the mortgage was not only for the money lent, but also for what he had promised her, but she did not apply to him for the latter. He, as it appears from her testimony, when she applied to him for repayment of the money lent, gave her a mortgage upon his property not only for that money, but for \$3,700 besides, which she had not asked him to pay. Of the money

Miller v. Sauerbier.

lent, she had no written evidence. She had no written evidence of agreement to pay her for her services. Nor was there any statement or calculation made to ascertain what was due. How the amount was fixed at exactly \$7,000 does not appear. After the mortgage was given, she gave no receipt or acquittance. It is noteworthy that the claim for money due her for her services is supported by no agreement. She testifies that, when she was seventeen years old, she was desirous of getting married, but her father induced her to refrain from so doing by the promise that if she would remain unmarried until she should have attained the age of twenty-five, he would give her \$300 a year. She was his oldest child, and she says she continued to live in his family, as a member thereof, until she was married. Her step-mother had charge of the family. Mrs. Kirchner appears to have done domestic services in the family the same as the other children, and, like them, was supported there. Her father kept two servants, and she says that there was no change in the household management from the time of her childhood until she was married. The attempt to prove services as housekeeper was unsuccessful. It is enough, however, to say that she proves no agreement to pay for her services; and, for services rendered under such circumstances, in the absence of an express agreement, the law will imply no obligation on the part of her father to pay her. *Gardner's adm'r v. Schooley*, 10 C. E. Gr. 150, and cases there cited.

As to the alleged loans of money: She accounts for the possession of so much money by saying that part of it was received by her as wedding presents from her brother and her brothers-in-law (her husband's brothers) and the wife of one of them, and the rest was her small savings "by dollars." Her wedding presents were, she says, as follows: From one of her brothers-in-law, \$1,000; from his wife, \$500; from another brother-in-law, \$500; from another, \$350; from another, \$150, and from her brother, \$500; in all, \$3,000. She says she never deposited this money in any bank nor

Miller v. Sauerbier.

with any person, but kept it herself in her own possession in bills, in envelopes, until she lent it to her father. There is, therefore, no corroboration of her statement from any depositary of the money. Nor does she even produce any of those who she says gave her the money, to corroborate her statement. The unusual character of these alleged wedding presents should, it would seem, have suggested the propriety of producing some evidence to corroborate hers. Her father never made even an entry in any book of the receipt of this money from her. It is noticeable that, in this controversy between her and her father's creditors, in which the *bona fides* of her claim is questioned, she has not attempted to show, except by her own testimony, the receipt by her of the money which she claims to have lent her father, nor does she offer any excuse for her failure so to do. She had no property, except these wedding presents and her small savings. In *First National Bank of Freehold v. Irons*, 1 Stew. 43, where the defendants alleged that the money with which the property in question was bought, was a gift, proof was adduced by the testimony of the giver and otherwise to establish the fact. Sauerbier, in his conversation with the attorney of the creditors, in the presence of one of the creditors, when inquired of as to the consideration of the mortgage, gave a different account of it from that given by Mrs. Kirchner. He said that the mortgage was given to her for \$7,000 because he had promised to give each of his children that sum when they came of age, and he had so provided in his will, and he gave her the mortgage to secure to her the sum so promised.

It cannot be doubted that he intended a fraud on his creditors, to defeat and hinder them by means of the mortgage to her. It seems evident that, in taking the mortgage, she understood and participated in his design. She does not deny that she knew, when the mortgage was given to her, that her father was embarrassed by his debts. She says she did not know, before that time, that he had got into trouble about the brewery (Wm. Bohler & Co.), but neither

Vandegrift v. Vandegrift.

she nor her father says that when the mortgage was given to her she was not aware of the fact that he was in trouble with his debts and was about to mortgage his property for the benefit of his creditors. If the mortgage was taken by her with knowledge of her father's object to defeat or hinder his creditors, by means of it, in obtaining payment of their debts out of his property, it cannot avail her as against their claims, but it will be postponed to their debts. *Tantum v. Green*, 6 C. E. Gr. 364; *Metropolitan Bank v. Durant*, 7 C. E. Gr. 35. Her mortgage will be postponed to that of Mr. Miller.

JOSEPH VANDEGRIFT

v.

VIRGINIA C. VANDEGRIFT.

On a bill filed by a husband for a divorce *a vinculo*, on the ground that, at the time of the marriage, a former husband of his wife was living, the wife's application for counsel fees and alimony will not be refused on *ex parte* affidavits contradicting the denials of her answer.

Bill for divorce. Motion for alimony *pendente lite* and counsel fee. On petition and affidavits on both sides.

Mr. A. Flanders, for petitioner.

Mr. F. Voorhees, for complainant.

THE CHANCELLOR.

The bill is filed for a divorce on the ground that the defendant, at the time of her marriage to the complainant, had a husband living. She has answered the bill. By her petition she makes, under oath, all the denial which can

Vandegrift v. Vandegrift.

reasonably be required of her upon this application. The complainant has produced numerous affidavits to show that the petitioner's former husband was living when she married the complainant. To these she opposes affidavits. It is obvious that, on this motion for counsel fee and temporary alimony, the court ought not to undertake to dispose of the merits of the litigation upon *ex parte* affidavits. The complainant insists that the affidavits on his side demonstrate the truth of the allegations of his bill, and that the cases of *Ballentine v. Ballentine*, 1 *Hal. Ch.* 471; *Begbie v. Begbie*, 3 *Hal. Ch.* 98; *Dougherty v. Dougherty*, 4 *Hal. Ch.* 540; *Martin v. Martin*, *Id.* 563; *Glasser v. Glasser*, 1 *Stew.* 22, are therefore decisive of this application. In those cases the court, indeed, on such a motion as this, looked into the merits of the application as disclosed by the pleadings and affidavits, and was guided in the exercise of its discretion thereby. But those were all suits for maintenance. In *Glasser v. Glasser*, which was decided by me, I was not satisfied of the *bona fides* of the petitioner in bringing the suit. None of those cases was for a divorce *a vinculo*. The rule applied in them ought not to govern this case. Here the complainant admits the fact of marriage, but alleges that the marriage was invalid because, as he undertakes to prove, the defendant, at the time of her marriage to him, had a husband living. She swears that she had reason to believe, and still believes, that her husband was then dead. To adjudge *in limine*, upon *ex parte* affidavits, that the complainant will probably succeed, and therefore to withhold from the defendant the means of resisting the attack, would be substantially, to a certain extent, a prejudgment adverse to her on the merits without lawful evidence, the consequence of which might and probably would be that she would be unable to defend herself. A good defence might, by such means, be prevented, and a bad cause consequently succeed. In the suits for maintenance above referred to, the consequence of the adjudication of the court was to compel the complainant to return to her husband's house, to be sup-

Vanderbeck v. Perry.

ported there, or to await further developments in the cause by which it would appear to be more probable that her right to separate maintenance would be established, or at least the *bona fides* of her application be made to appear more satisfactorily. The defendant in this case is penniless, and unless this court provides her with the means of defence (which the complainant is abundantly able to furnish), she must go undefended.

The complainant will be ordered to pay a counsel fee of \$50, and \$5 a week for temporary alimony.

ISAAC J. VANDERBECK

v.

GEORGE C. PERRY and others.

1. A demurrer to a bill was overruled. The complainant thereupon took an order to amend his bill, which order required the service of the amended bill on the defendant. That order was never served. The demurring defendant took no copy of the bill from the clerk's office. After the taking of that order, another order was taken by the complainant, stating the amendments and providing that the bill stand amended on the order. This order was duly served. Subsequently, on the death of another defendant, another order of amendment, by way of revivor, was taken. This order was served on the demurring defendant's solicitor. It contained a direction to answer in twenty days. No answer was at any time filed by the demurring defendant. A decree *pro confesso* was taken against him, after the expiration of the twenty days. On petition to open this decree,—*Held*, that the demurring defendant was bound by the statute to answer, without order to that effect, in forty days from the overruling of the demurrer, and that his duty in this respect was not affected by the existence of the first order which was never served.

2. It not appearing that the defendant has a meritorious defence, the misapprehension of his solicitor as to his duty to file an answer, is in itself no ground for relief.

Vanderbeck v. Perry.

Bill for relief. On petition to open decree and let in a defendant to answer.

Mr. J. B. Vredenburg, for the petitioner.

Mr. F. McGee, *contra*.

THE CHANCELLOR.

The demurrers in this cause (which were general) were overruled, with costs, by order of the 24th of July, 1877. The order provided that the complainant have leave to amend by adding the names of Edwin Bisbee and his wife, as parties to the suit, "with such apt and proper words as should be necessary to charge them as defendants," and directed that the defendants plead, answer or demur to the bill so amended, within forty days after service of a copy thereof on their solicitors, if any, or, if none, upon the defendants. This order was never served. The defendant George C. Perry had not obtained a copy of the bill when the demurrer was overruled. In October, 1877, and after the expiration of the forty days within which the demurrants were bound, by the provision of the statute, to file their answers, the complainant (none of the defendants had answered) obtained an order providing for the same amendment as the former order, but specifically mentioning the words of the amendment and designating the places in which they were to be inserted in the bill. This order directed that a copy thereof should be served on the solicitors of each of the defendants who had appeared, and that such service should be considered a sufficient amendment of such defendants' copies of the bill, and that the original bill need not be re-engrossed, but might be amended by inserting the amendment therein by interlineation. The amendment was made. A copy of the last-mentioned order was served on the solicitors of the defendant George C. Perry, the petitioner, on the 25th of October, 1877. On the 8th of April, 1878, another order was made in the cause, reciting the mak-

Vanderbeck v. Perry.

ing of the order last mentioned; that it appeared that Bisbee had died before the beginning of the suit, leaving a widow and children; that the fact of his death did not come to the complainant's knowledge until after the making of the last-mentioned order, and that the only pleadings which had been filed in the cause, up to that time, were the demurrers which had been overruled, and directing that the bill be amended by making the widow and children defendants. It specifically stated the amendments as in the order of October, 1877, and gave the same direction as to the manner of amending the bill on file, and the copies thereof of the defendants who had appeared. It further directed that the defendants plead, answer or demur to the amended bill in twenty days after service of a copy of the order on their respective solicitors. A copy of this order was duly served on the solicitors of the petitioner, on the 9th of April, 1878. He never, at any time, pleaded or answered, nor did he again demur. On the 8th of May, 1878, twenty-nine days after the service of the order of April on the solicitors of the petitioner, a decree *pro confesso* was made against him in the cause. By that order leave was given to the complainant to adduce proofs to substantiate the allegations of his bill, and bring on the hearing of the cause *ex parte* as to the defendants against whom the bill was taken as confessed. Proofs were taken accordingly, and a final decree was made on the 4th of June, 1878, according the relief prayed by the bill.

In August, 1878, George C. Perry filed his petition, praying that the final decree may be opened, and that he may be let in to answer. It does not allege that he has a meritorious defence. Indeed, he does not state what his defence is, but rests his application on the claim that the proceedings are irregular as to him. It is urged in his behalf that, although he would, if the order of overruling the demurrer had contained no direction as to answering, have been bound to plead within forty days from the time of filing the order, without service of the order or notice of any kind,

Vanderbeck v. Perry.

yet that, since it by its terms provided for the amendment of the bill and required the defendant to plead in forty days after service of a copy of the amended bill, he was not bound to answer the bill at all until after such service, and was entitled to forty days after such service to file his answer. But that provision had reference only to the amended bill, and he was bound under the statute to answer the original bill, without order to answer or notice, and was bound to file his answer thereto in forty days from the time of filing the order overruling the demurrer (*Rev. Chancery*, § 25). An order to amend operates only from the time of service. *Price v. Webb*, 2 *Hare* 515. The order to amend was, therefore, inoperative as to him, for it was never served. The obligation of the petitioner to answer the original bill was not affected by it. The order of October, 1877, was served. It directed that the amendment be made, and that service of a copy of that order on the solicitor of the defendants should be regarded as an amendment of the defendants' copies of the bill. The petitioner had taken no copy of the bill up to the time of service of a copy of that order. The amendments in fact, it may be remarked, required no answer from him. They were merely the addition of parties whose connection with the subject of the suit was set out in the original bill, but who had not been made parties thereto, on the supposition that they had no interest in the controversy. *Vanderbeck v. Perry*, 1 *Stew.* 367. The amendments introduced no new fact, and in nowise affected the merits of the case. On the 8th of April, 1878, the complainant again amended the bill by making the widow and children of Bisbee parties. The order directing this amendment required the defendant to answer in twenty days after service of a copy thereof. A copy was duly served on the petitioner's solicitors, but, as before stated, he did not answer within the time limited, nor at all. The petitioner has no claim to relief on the ground of irregularity of the proceedings. If his application be considered on the ground of misapprehension on the part of his solicitor of his obli-

Perkins v. Partridge.

gation to answer, under the circumstances it is enough to say he shows no merits, but merely says that he has a defence. His application is in fact presented by his petition on the ground of irregularity in the proceedings alone, and on that he has no standing.

The petition will be dismissed.

L. MURRAY PERKINS

v.

CHARLES F. PARTRIDGE and others.

Where representations were made by the holder of a mortgage for \$7,000, that he had sold the mortgaged premises to the mortgagor for about \$50,000; that it was first-rate property; that the land was good and the timber thereon valuable; that the land would be more valuable after it was cleared; that the mortgage was a good mortgage; and that the interest thereon had been paid regularly—all of which were false and fraudulent—*Held*, that they could not be regarded as *simplex commendatio*; and a conveyance of lands obtained thereby was set aside.

Bill for relief. On final hearing on pleadings and proofs.

Mr. B. A. Vail, for complainant.

Mr. S. M. Dickinson, for defendants.

THE CHANCELLOR.

The complainant seeks to set aside a conveyance made by him to Charles F. Partridge, on the 1st of August, 1875, whereby he conveyed in fee to the latter his house and lot in Woodbridge township, in the county of Middlesex, for the consideration (including the price of certain household furniture sold with the property) of \$10,000, subject, however, to a mortgage of \$3,000 thereon. For the balance,

Perkins v. Partridge.

\$7,000, of the purchase-money, after deducting the amount of the mortgage, he agreed to receive, and did receive accordingly, a mortgage of that amount then held by the defendant, Charles Partridge, father of the grantee, on nineteen hundred and twenty acres of wild land in Brown's tract, in Herkimer county, New York. The ground of the complainant's complaint is that he was induced to accept the last-mentioned mortgage through false and fraudulent representations in reference thereto made by the defendants. These representations, according to the bill, were, that the property was a good and safe security for the money the payment of which the mortgage purported to secure; and that the mortgaged land was sold by Charles Partridge to the mortgagor at the rate of \$25 an acre. The bill alleges that, in fact, the mortgagor (who was also the obligor in the bond therein mentioned, and the payment of which it was made to secure) was a man of no pecuniary responsibility; and that the mortgaged premises were not sold by Charles Partridge for any such sum of money as the defendants represented, and were worth only about \$2,000.

That the complainant was defrauded by the representations of the defendants, is clear from the evidence. His property was brought to the notice of Charles F. Partridge by Frederick Reed, a real estate agent, to whom Partridge had applied with a view to obtaining an exchange of some Brooklyn property of his for country property. Reed had the complainant's property also in hand to find a purchaser for it. He mentioned to each of the parties the property of the other, with a view to exchange. The complainant was not satisfied to exchange at the price at which the Brooklyn property was held. This was communicated by the agent to Partridge, who then said he had made up his mind to retain his Brooklyn property and get a country place in some other way. He then said that "his father (the defendant, Charles Partridge,) had a mortgage of \$7,000 on land in Herkimer county which was good, which he would put in in exchange; that his father would let him have it to use,

Perkins v. Partridge.

but not for a cent less than the face of it; and that he would have to pay his father for it.” After the contract was signed, and on the day when the deed was delivered and before the papers were exchanged, the complainant and Charles F. Partridge and his father being then at the lawyer’s office to exchange the papers, Reed, who was there also, sought and obtained a private interview with Charles Partridge, the father (who seems to have interested himself in getting the contract drawn and signed), and then said to him that the complainant, as he, Reed, had learned, knew nothing about the \$7,000 mortgage, had had no time to search the title or investigate the matter at all, and would have to rely entirely on what he, Partridge, said about it. Partridge then said that it was a perfectly good, first-class mortgage; that the parties were good, and that the interest had always been paid promptly; that he had sold the land for \$25 an acre, and would not sell any more of the tract for less than \$30 an acre. Reed thereupon informed the complainant of the purport of the conversation, and the deed was then delivered and the mortgage accepted. The complainant testifies that Charles Partridge came to see his property before the contract was entered into, and then mentioned the mortgage to him, saying that it was a good mortgage, and that he had sold the land on which it was for \$25 an acre. The complainant testifies that Charles F. Partridge told him, both before and after the conveyance had been made, that he would have to pay his father \$7,000 for the mortgage; that \$6,999 would not buy it. The complainant’s wife corroborates him in this statement as to one occasion, she having been present when Charles F. Partridge said substantially the same thing to him. The fact appears to be that Charles Partridge not only did not sell the mortgaged premises for \$25 an acre, but did not sell them at all. He swears, indeed, that he sold them to the mortgagor, Thomas H. Phillipps, and the deed to the latter probably (it has not been laid before me) expresses a consideration in accordance with the representations, but it is evident that there was no *bona fide*

sale at all. Charles Partridge, indeed, swears that Phillipps paid something, besides giving the mortgage, as consideration, but admits that it was only from \$10 to \$25, and though he further says that Phillipps agreed to pay \$15 or \$20 an acre, Phillipps swears that he gave no consideration except the mortgage. It seems extremely probable that the conveyance to Phillipps was made merely in order to obtain a mortgage from an apparent purchaser. Charles Partridge testifies that he made an exchange of the property with certain persons whom he designates as Charles F. Bouton and DeWitt H. Phillipps (though the conveyance to Thomas H. Phillipps had then been made), and that he gave Thomas H. Phillipps a consideration for conveying directly to them. It appears that he gave him about \$50 for his trouble in the matter. Thomas H. Phillipps says that he thinks the conveyance to Bouton and Phillipps was made on the same day on which the property was conveyed to him. The deed to Bouton and Phillipps has never been put on record, and neither of the defendants can give any trustworthy account of either of those persons.

The statement made by the defendants, of the manner in which the son accounted to the father for the value of the mortgage, is unsatisfactory.

Again, there is evidence of fraudulent design in the endorsements of interest made by Charles Partridge on the bond. Six months' interest is endorsed thereon as having been received in September (the word, however, is written over the word "March"), 1874, from Thomas H. Phillipps, and the same amount from him on the 7th of April, 1875, while the evidence is, that Thomas H. Phillipps conveyed away the property on the same day on which it was conveyed to him, March 6th, 1874, and he swears that he never paid Charles Partridge, or any one else, any interest on the mortgage. It is worthy of remark, in this connection, that Charles Partridge says, in his testimony, that he received this interest of Bouton and Phillipps, and that the Phillipps of that firm was not Thomas H. Phillipps. No

Perkins v. Partridge.

interest has been paid on the mortgage since it was assigned to the complainant.

The mortgaged premises appear to have been valued, in 1866, at \$2 an acre, and their value consisted, principally, in the bark of the hemlock trees growing on them. The right to this bark was reserved by the grantors, in the deed to Partridge, and the bark has since been taken away by them. The land, therefore, appears to be of little, if any, value. Nor are the representations which were made by the defendants to induce the complainant to accept the mortgage, to be regarded as mere "dealing talk"—*simplex commendatio*. They were substantial, important representations as to existing facts, materially affecting the character and value of the mortgage. That the mortgaged premises had been sold, by the mortgagee, to the mortgagor for about \$50,000; that the property was first-rate property; that the land was good and the timber valuable; that the land would be more valuable after it was cleared; that the mortgage was a good mortgage—all these are false allegations as to the existence of material facts.

By means of these false and fraudulent representations, made, it is evident, for the purpose of inducing the complainant to accept the mortgage as \$7,000 of the purchase-money of his property, the defendants were enabled to obtain the conveyance of that property. The complainant made no investigation as to the character of the mortgage, or the value of the mortgaged premises, because of his confidence in those representations, and it appears that the defendants were anxious and in haste to close up the transaction and obtain a deed for his property. The complainant has been guilty of no laches to debar him from relief. It appears, from the testimony, that, by the agreement, Charles F. Partridge was to have the interest which would become due on the mortgage on the 6th of September, 1875. The principal of the mortgage was not due until March 6th, 1877. The bill was filed on the 16th of December, 1875. The complainant, before filing the bill; and after he found

American Insurance Co. v. Andrew.

that he could collect no interest on the mortgage, requested Charles F. Partridge to reconvey the Woodbridge property to him, offering to re-assign to him the mortgage, but Partridge refused. The complainant is entitled to relief. The deed should be set aside and a reconveyance to the complainant ordered on the complainant's re-assigning the bond and mortgage to the defendant, Charles F. Partridge. He, according to the testimony of his father, purchased it of him, and has paid him therefor, in full. Charles F. Partridge must account, also, for the use and occupation of the house and lot conveyed to him by the complainant, and for the value of the household furniture. The defendants will be decreed to pay costs.

THE AMERICAN INSURANCE COMPANY

v.

LUCY ANDREW.

By the act of 1871 (*Rev.* p. 410), sheriffs were, for their services, allowed to add twenty-five per cent. to their fees, so long as the United States bankrupt act should remain in effect. By the act of 1877 (*Rev.* p. 1335), the act of 1871 was repealed, but with a proviso that the repealer should not affect or in anywise interfere with the fees of any sheriff who might be in office when such repealer took effect.—*Held*, that a sheriff who was in office at that time is not entitled to the additional twenty-five per cent. for services since September 1st, 1878. The act of 1871 expired by its own limitation at that date (September 1st, 1878), when the bankrupt law was repealed.

Motion for retaxation of sheriff's execution fees.

Mr. F. H. Howell, for complainant.

Mr. W. S. Whitehead, for the sheriff.

American Insurance Co. v. Andrew.

THE CHANCELLOR.

This is an application for retaxation of sheriff's fees. The fees in question are claimed for services rendered since the 1st of September, 1878. The sheriff by whom they were rendered was in office when the act of March 6th, 1877 (*Rev.* p. 1335), took effect.

The act of March 14th, 1871 (*Rev.* p. 410), by its second section, provided that, from and after the passage of the act, twenty-five per cent. additional in each case should be allowed to the sheriffs of the several counties for all services to be by them performed; provided, however, that that section should only continue in force during such time as the act of congress commonly known as the bankrupt law, should remain in effect. By the act of 1877, the act of 1871 was "repealed, made void and of no effect," with proviso that the repealer should not affect or in anywise interfere with the fees of any sheriff of any county who might be in office when the repealer took effect. The act of 1871 was thus put out of existence except so far as fees of sheriffs then in office were concerned. As to them it was not repealed. But, when the repeal of the bankrupt law took effect, the act of 1871 expired by its own limitation, and from that time ceased to exist as to all sheriffs. The position that the legislature designed, by the proviso of the act of 1877, not only to exempt sheriffs then in office from the operation of the repealer, but also to continue to them during their entire terms the benefit of the twenty-five per cent., cannot be maintained. They manifestly merely intended the former. Their meaning in the legislation under consideration appears to be too plain to admit of any construction except such as the language obviously imports.

The twenty-five per cent. additional will not be allowed for services rendered since the 1st of September, 1878, and there will be a retaxation accordingly.

Bergen Savings Bank v. Barrows.

THE BERGEN SAVINGS BANK

v.

JAMES M. BARROWS and others.

1. Where the holder of a first mortgage has received ample collateral security for its payment, the rights of a subsequent mortgagee cannot be defeated by the assignment of the first mortgage to a party who had full notice and knowledge of such other encumbrance and the equity of the holder thereof in respect to such collateral security.

2. A mortgage held by J. B., covering several lots of land, had been reduced to \$7,400 at the time when the mortgagor sold an unreleased lot to M. & R., with full covenants of warranty &c., receiving therefor a mortgage. In order to obtain releases of some of the other lots, the mortgagor assigned to J. B. two other mortgages, for \$6,500, and his own note for \$900. Afterwards, such mortgagor assigned to F. the M. & R. mortgage, representing to F. that it was a first mortgage. To secure another debt, the mortgagor and the complainants induced J. B. to assign to the complainants the \$7,400 mortgage, which was taken by them with notice and knowledge of the equity of F.—*Held*, that, as to the amount of the collaterals, \$6,500, the complainant's mortgage must be held to be satisfied as against F.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. W. Brinkerhoff, for complainants.

Messrs. Collins & Corbin, for defendant Bill.

THE CHANCELLOR.

In 1865, James M. Barrows, who was then the owner of a tract of land in Jersey City, gave a mortgage upon it to secure the payment of \$25,000, with interest. This mortgage was subsequently (June 10th, 1867) assigned by the mortgagee to Bartholomew Brown, in trust for Mary S. Brown. The assignee and his *cestui que trust* afterwards, from time to time, released parts of the mortgaged premises from the lien and encumbrance of the mortgage. On the

Bergen Savings Bank v. Barrows.

1st of November, 1871, Barrows conveyed part of the unreleased residue of the property to William T. Mount and William Russell, by deed, with the usual full covenants, including covenant against encumbrances and covenant of warranty general, taking from them mortgages for the purchase-money. At that time all the principal of the complainant's mortgage, which was then held by Brown, had been paid, except \$7,400. In order to obtain releases of other parts of the premises covered by that mortgage, Barrows assigned to Brown two mortgages, one called the Sutton mortgage, for \$2,500, assigned March 1st, 1872, the other called the Redman and Mabin mortgage, for \$4,000, assigned January 8th, 1874, and gave him his note for \$900. On the 23d of July, 1874, Barrows assigned one of the mortgages received by him from Mount and Russell to the defendant Frederick Bill, representing to him that it was the first mortgage on the property, and guaranteeing the payment thereof. That mortgage, though nominally for the sum of \$7,000 and interest, was, in fact, security for only \$2,000 and interest, and it was so understood between Barrows and Bill when the assignment was made. The representation that that mortgage was a first mortgage was untrue, because the complainants' mortgage, then still held by Brown, was upon the property. Barrows justifies the representation on the ground that he at that time regarded the Brown mortgage as having been practically paid by the collaterals—the mortgages and note before mentioned, which Brown then held.

In the fall of 1875, Barrows (who, from 1870 up to that time, had been president of the Bergen Savings Bank), the complainant, was requested by the board of trustees of the institution to resign. Among the reasons for this action was the fact that he had, without authority and unlawfully, invested the funds of the bank on second mortgage, and that, too, of property in which he was, or subsequently became, interested. He was embarrassed in his pecuniary affairs, and suits had been commenced against him. He

Bergen Savings Bank v. Barrows.

sent in his resignation, and, for the purpose of relieving himself from the difficulties of his situation in connection with the loans just referred to, he proposed that the bank should lend him \$7,400 on the security of the Brown mortgage. The secretary of the bank testifies, on the subject of the proposition and agreement, as follows: "Barrows said that he was authorized to say that Brown would assign the mortgage to the bank, and accept from him \$1,400 cash and the \$6,000 worth of mortgages which Brown then held as collateral. I think these mortgages were, first, a mortgage for \$4,000 on a house on Grand street, and, second, a second mortgage against William H. and Martha Sutton. I am satisfied, upon reflection, that these were the mortgages. Now Barrows said that if we, the bank, would pay him \$7,400, he would pay the taxes and assessments on this property covered by the mortgage, being the six lots on Madison avenue, and would also pay off the \$2,600 mortgage on the Clerk street house (this was one of the second mortgages taken by him for the bank), of which he was the owner; and, as he, when president of the bank, had loaned \$1,600 on that mortgage, he would ask the bank to endorse the \$1,000 on account of the note of Mount and Russell for \$1,400, which was secured by a second mortgage of James E. Moore, on a brick house on Bramhall avenue, in Jersey City. That proposition was, after considerable consideration and discussion, both at that (the meeting at which it was made) and at subsequent meetings of the trustees, accepted, with the clear understanding that there were \$7,400 due on the Brown mortgage, and that Barrows would get Brown, trustee, to take the mortgages which he then held as collateral, absolutely from Barrows, on behalf of the bank, and that Barrows should pay Brown \$1,400 of the money which he, Barrows, should receive from the bank, for the bank." This agreement was executed on the 11th of February, 1876. Barrows, on that day, received from the secretary of the bank the bank's two checks, one for \$1,400 and the other for \$6,000. The secretary met Brown

Bergen Savings Bank v. Barrows.

and Barrows together, received the assignment of the bond and mortgage from Brown to the bank, and thereupon delivered to Barrows the check for \$1,400, which he at once endorsed to Brown, trustee. The secretary then handed the \$6,000 check to Barrows, who then endorsed and delivered it back to him. The secretary afterwards drew the money, and paid it out, according to the agreement, for and on account of Barrows.

In this transaction the bank officers wholly ignored the rights of Bill. They not only were apprised of them, but they knew that he asserted them. The secretary says that Barrows told the trustees, before the agreement was executed, that he had seen Bill, who had a second mortgage on one of the lots, and that he could arrange with him for the small balance which was due on his mortgage. He further says that some reply was made to this, and some one inquired as to what transaction Barrows had had with Bill; that Barrows said that Bill had lent him money from time to time; that he thinks Barrows said Bill held a mortgage against him for \$4,000, on a Grand street house, and something about a Staten Island transaction; that Barrows said that Bill had threatened him with suit or arrest if he should have Brown assign the mortgage to the bank; that Barrows said he could arrange it with Bill, and that Bill held some securities for him, and their arrangements were such that he could either assign the Dixon mortgage on the Clerk street house, or fix it up in some other way. He says they all talked and discussed the whole question; that he does not remember the words of any other conversation, but they "had it, *pro* and *con*," for three or four hours; that Barrows was to see Bill and arrange the matter; that he subsequently reported that he had done so, so far as Bill was concerned; that the offer of Barrows's settlement with the bank, and the offer to assign the Brown mortgage to the bank, were not contingent upon Bill's accepting the arrangement with Barrows; that Barrows first mentioned Bill's name, and that Barrows said that Bill had "suggested

Bergen Savings Bank v. Barrows.

his, Barrows's arrest—to arrest him for obtaining money from him on false pretences.” He adds that Barrows said that he had represented to Bill that the mortgage he had assigned to Bill was a first mortgage, although he admitted to them that it was a second or third mortgage; that Barrows said he would have Brown assign that mortgage, and he could arrange with Bill so that it would be all right. The bank officers, also, it may be added, caused a search of the records to be made before executing the agreement. By this, too, they were apprised of the existence of Bill's mortgage. It is clear, from the evidence, that they not only knew of Bill's rights, but relied on Barrows's undertaking to protect the bank against them.

The transaction between the bank, Barrows and Brown was not the purchase of the Brown mortgage by the bank from Brown, but was, in fact, the loan by the bank of \$7,400 to Barrows upon that mortgage, after he had paid it off in the hands of Brown. For the mortgage Barrows gave to Brown his bond for \$6,500, and agreed that the latter should hold the Redman and Mabin mortgage and the Sutton mortgage, together amounting to \$6,500, as security therefor; and out of the money received by Barrows from the bank as consideration for the assignment of the Brown mortgage, he paid to Brown \$1,400, \$900 of which were applied in payment of his note of that amount, held by Brown, and the balance, \$500, was endorsed as a payment on the bond of \$6,500. The \$7,400 paid by the bank was paid in checks to the order of Barrows, and the money was all disbursed for him, and on his account, at his request, and for his benefit. A small balance of about \$300 was paid over to him. Of the \$7,400, the sum of \$2,712.19 was paid to the bank itself, on the claim against Barrows, to obtain payment whereof was the object of the advance by it to him. By the new bond and the collateral mortgages, the Brown mortgage was satisfied *pro tanto* as against the holder of a subsequent encumbrance on the property. *Bolles v. Wade*, 3 Gr. Ch. 458. But to the extent (\$900) to

Bergen Savings Bank v. Barrows.

which the money advanced by the bank was employed in satisfaction of the mortgage debt due Brown, after applying the collaterals, the mortgage retained vitality and its priority over such subsequent encumbrance. *Hoy v. Bramhall*, 4 C. E. Gr. 563. The bank, when it took the assignment, knew of the equity of the subsequent encumbrancer, which was, as between him and Brown, to require the latter to reduce to the satisfaction of his debt the collateral securities in his hands. Those securities were of the value of \$6,500. This would have left but \$900 encumbrance on the mortgaged premises, prior to Bill's mortgage. Brown does not appear to have had notice of Bill's equity, but the bank had, and, under the circumstances, it can have no better position than Brown himself would have had with like notice. If he had had notice of Bill's equity, he would not have been permitted to defeat it. He had two funds for the satisfaction of his debt, and Bill only one. He would not have been permitted to defeat Bill's equity by electing to satisfy his debt out of the latter fund, and relinquishing to Barrows the former. The bank, as before remarked, had full knowledge of the equity, and with that knowledge it became a party to an arrangement by which Brown, though he had recourse to the collaterals for the satisfaction *pro tanto* of his mortgage debt, at the same time assigned the mortgage to the bank, to be held as a still subsisting encumbrance on the mortgaged premises; thus enabling Barrows to make the collateral mortgages available to himself, and defeat Bill's equity. A paramount creditor who, having two funds, only one of which is common to him and a junior creditor, takes, with knowledge of the rights of the latter, that which is his only resort, will be required in equity to cede so much of the other fund as will compensate for the injury. The bank is not entitled to the protection accorded to a purchaser for value without notice, for not only had it notice, but it undeniably advanced the money to Barrows, on the security of the assignment of the Brown mortgage, in order, and merely in order, thus to obtain payment of the

Titus v. Titus.

debt of \$2,712.19 before referred to, relying upon Barrows to satisfy Bill. Under such circumstances it is entitled to no protection, except as to the \$900. *Herbert v. Mechanics Association*, 2 C. E. Gr. 497. The complainant's mortgage is entitled to priority over Bill's, to the amount of \$900, and no more, of principal, with the interest thereon. To pay that money, that part of the mortgaged premises which is not covered by Bill's mortgage, must be first sold.

RANDOLPH TITUS and others

v.

HARMON H. TITUS and others.

The orphans court ordered an executor to give security for his trust. From this order he appealed, the next day, to the prerogative court. A sale of the testatrix's personalty had been advertised by him to be made on the latter day, and he was proceeding therewith without having given the security, whereupon, on application of the testatrix's children interested in her estate, an injunction was issued to restrain such sale until after the bond had been given. Afterwards it was given.—*Held*, that since it was the executor's duty to comply with the order or postpone the sale until he had obtained its reversal, he must pay the costs of the injunction suit.

Bill for injunction. On final hearing on bill and answer of Harmon H. Titus.

Mr. J. Schomp, for complainants.

Messrs. Bartine & Davis, for Harmon H. Titus.

THE CHANCELLOR.

The orphans court of the county of Somerset, by their order made on the 20th of November, 1877, after reciting that they had heard the counsel of the respective parties,

Titus v. Titus.

and had considered the law and the proofs, and were satisfied that Christopher S. Hoagland, one of the executors of the last will and testament of Jane V. Titus, deceased, was, by reason of physical and mental afflictions and infirmities, then unable to attend to his duties as executor, and that the property belonging to the estate was unsafe in the hands of Harmon H. Titus, the other executor, ordered the latter to give security to the ordinary, by bond, with good and sufficient sureties, in the sum of \$2,500, conditioned for the faithful performance by him of his duty as such executor.

The executors had advertised the sale of the household furniture, farming implements, cattle and other personal property of the testatrix, of very considerable value, to take place on the next day after the order was made. Harmon H. Titus proposed to sell the property on the day fixed in the advertisement, without giving bond, notwithstanding the order, and on that day he appealed from the order to the prerogative court. Seeing that he intended to proceed to sell the personal property without giving the bond, the complainants, the children of the testatrix, and interested in her estate under the will, filed their bill to restrain the executors from selling until after the bond should have been given. The injunction was granted. Harmon H. Titus answered the bill. The other executor did not. The bond was given on the 10th of December, 1877. The only question now involved is the question of costs.

It will be observed, that the order was made on the 20th of November, the day before the sale was to take place, according to advertisement. It is admitted by the answer, that Harmon H. Titus intended to proceed to sell on the 21st, without previously giving the bond. He could only be prevented from so doing by injunction out of this court. It was his duty, in view of the requirement of the order of the orphan's court, to refrain from proceeding to sell until he had given bond, or had obtained a reversal of the order by means of an appeal. He must pay the costs of this suit.

Jersey City v. Fitzpatrick.

THE MAYOR AND ALDERMEN OF JERSEY CITY

v.

ANEAS FITZPATRICK.

A city took land, by proceedings in condemnation, under its charter, for a street, and entered into possession and built a sewer therein, but did not pay the price awarded; the owner subsequently brought ejectment and recovered judgment, and obtained a *hab. fac. poss.*—*Held*, that the city was entitled to equitable relief, and an injunction was awarded on terms of payment of the award and interest, and costs of the ejectment.

Bill for relief. On final hearing on bill and answer and two memorials of defendant, one to the board of aldermen of Jersey City, the other to the board of public works of that city.

Mr. L. Abbett, for complainant.

Mr. J. Garrick, for defendant.

THE CHANCELLOR.

The bill prays an injunction to restrain the defendant from closing up part of a street in Jersey City, known as Jackson avenue. The site of the part of the street which he threatened to close up is land owned by him, his right to possession whereof, as against the complainants, has been established at law. *Mayor &c. of Jersey City v. Fitzpatrick*, 7 Vr. 120. The corporate authorities of the city of Bergen, in 1867, took the necessary lawful measures to extend the then existing street called Jackson avenue, over the lands in question. The proceedings were regular. The defendant's damages were duly assessed, July 1st, 1868, at \$900.92. On the 20th of the same month, the board of aldermen confirmed the assessment and award. On the 14th of September following, the board directed the treasurer of the

Jersey City v. Fitzpatrick.

city to pay the owners of land taken for the extension the sums awarded to them. On the 15th of March, 1869, the board passed a resolution directing that a warrant be drawn in favor of the city treasurer for the sum of \$35,995.97, to pay, among others, those awards; but, on the 24th of May following, they directed that the warrant be returned and cancelled. Soon after that action, the city of Bergen was consolidated with Jersey City.

The authorities of Bergen took possession of the land for the purposes of the extension, soon after the confirmation of the award, and it has been used as a public street ever since. In 1868 they began the construction of a public sewer in it, which was not completed until 1870. In January, 1871, the defendant presented to the board of aldermen of Jersey City a communication in writing, asking payment of the amount of the award to him, less the amount assessed to him for benefits. They refused to pay the money, on the ground that proceedings in *certiorari* in respect to the improvement were pending in the supreme court. In November, 1871, the defendant brought an action of ejectment, in the supreme court, against the complainants, to recover the land. The suit resulted in a judgment in his favor, at February term, 1872. *Mayor &c. v. Fitzpatrick, ubi supra*. On the 7th of August, 1877, he presented to the board of public works of Jersey City his memorial, in which he declared his intention to take possession of the land, and the sewer and improvements thereon, which he claimed to be his property, and to close the street, unless the board should, within a reasonable time, agree to purchase the lands and pay a reasonable compensation therefor. This demand was not complied with, and he then, with a view to obtaining possession of the property, caused to be issued and delivered to the sheriff a writ of *habere facias possessionem*, which was duly executed. The treasurer of the city, after that writ was executed, tendered to the defendant a warrant for the amount of the award, and interest thereon from its date, which he refused to accept.

Kipp *v.* Merselis.

The defendant has, ever since the taking of his land for the street, been entitled to the compensation awarded to him therefor. He appears to have acquiesced in the use of the land by the city pursuant to the proceedings in condemnation, up to the time of bringing his action of ejectment, November 11th, 1871. In the meantime, the city authorities, dealing with the property according to the condemnation, had constructed a sewer there, the building of which was begun in 1868, and was not finished until the spring of 1870. After the sewer was completed, the property being in use as a street, the defendant claimed compensation under and by virtue of the proceedings in condemnation. Under the circumstances, he should, in equity, be restrained from closing up or obstructing the street on the premises in question, or interfering with the use of that property as a street; but, at the same time, he should receive just compensation, which will be the award and interest thereon. And he is entitled, also, to the costs of the ejectment suit, including the costs of the execution, and to his costs of this suit; for the complainants, under the circumstances, ought to have tendered him not only the award and interest, but the costs of the ejectment suit, which their refusal to pay for his property taken by them for public use, rendered necessary to his protection.

RICHARD P. KIPP*v.*

JANE MERSELIS and others.

In 1856, Jacob Merselis bought a tract of land, consisting of a stone house and vacant lot, subject to Kipp's mortgage on the whole premises; in 1859, he and his wife, Jane, executed a mortgage to Lum on the whole tract; in 1867, Jacob, for a valuable consideration, conveyed the vacant lot to Jane; in 1870, he gave a mortgage on the stone

Kipp v. Merselis.

house to Mandeville; and in 1873 he gave one on the stone house to Steele; in 1872, judgments were recovered against Jacob, under which his interest in the whole tract was purchased by Jane, who made the purchase at Steele's request, *ex benevolentia*, to protect his mortgage, and accordingly and for that purpose alone (the protection of his mortgage debt on the mortgaged premises), in 1873, Jacob and Jane gave a new mortgage on the stone house to Steele, in lieu of his old one; and, afterwards, they gave one to Kimble (now Hamilton's) on the vacant lot.—*Held*, that Steele has no equity, as against Jane and Hamilton, to require Kipp and Lum to have recourse to the vacant lot, before resorting to the stone house, in order to satisfy their mortgages.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. R. I. Hopper, for complainant.

Mr. G. S. Hilton, for Mrs. Merselis.

Mr. A. B. Woodruff, for Hamilton.

Mr. J. C. Paulison, for Steele.

THE CHANCELLOR.

The only question submitted on the hearing was, as to the equities claimed for Steele's and Hamilton's respective mortgages and the equity claimed for Mrs. Merselis in protection of the property covered by the latter mortgage, against the respective mortgages of the complainant and Lum.

The complainant's mortgage was given January 27th, 1855, by Hausman De Baun and his wife, upon a lot of land in Market street, in Paterson. On the front of part of it there then was, and still is, a stone house. The rest of the lot was vacant. Subsequently, January 16th, 1856, De Baun sold and conveyed the property to Jacob Merselis. After the making of that conveyance, and on June 1st, 1859, Merselis gave a mortgage on the same property to

Kipp v. Merselis.

John Lum. On April 23d, 1867, he conveyed part of the property (the part known as No. 39 Market street, and which was vacant) in fee to Daniel H. Winfield, for the consideration, as expressed in the deed, of \$2,000; but, really, only to the end that he should convey it to Jane Merselis, the wife of the grantor; and Winfield, by deed dated the next day (April 24th, 1867), conveyed it in fee to Mrs. Merselis, by deed expressing a consideration of \$2,000. Those deeds both contained the usual full covenants, including covenant against encumbrances and covenant of general warranty. It appears, by the evidence, that they were not voluntary, but upon valuable and sufficient consideration, which was money received by Merselis from the sale of his wife's separate estate, inherited from her father. On November 1st, 1870, Merselis (he then owned only the new stone house lot) gave a mortgage on that lot to Jane Mandeville, and, January 14th, 1873, he gave one on that lot to John Steele.

Between the times of giving the Mandeville and Steele mortgages, judgments were, in July, 1872, recovered against Merselis (some in the supreme court and some in the circuit court of Passaic county) to the amount of about \$8,600. Under executions issued upon them, the sheriff of that county sold land as the property of Merselis, and at the same time sold, also, his right, title and interest in both lots of the De Baun property. Mrs. Merselis bought her husband's interest in those lots, at the sheriff's sale, for \$2,500. The deed from the sheriff to her is dated December 21st, 1872. On January 14th, 1873, she and her husband gave a mortgage to Steele on the stone house lot, which was recorded February 13th, 1873. On May 1st, 1873, they gave one to Henry Kimble (now held by Henry Hamilton) on the other lot, for \$2,000 of the money due to him for building a frame dwelling-house on that lot.

Steele insists that, inasmuch as Mrs. Merselis was, when she gave him his mortgage (the mortgage of 1873), the owner of both lots, he is, in equity, entitled to have the frame house lot sold to pay the mortgages of the complain-

Kipp v. Merselis.

ant and Lum (each of which is on both lots), before recourse is had to the stone house lot; and that neither she nor Hamilton (who claims under her) can set up against him her equity under the conveyance by her husband, through Winfield, to her. Hamilton and Mrs. Merselis, on the other hand, resist this claim, and insist that Hamilton is, in equity, entitled to have the stone house lot sold for the satisfaction of the mortgages of the complainant and Lum, before recourse is had to the frame house lot.

It appears that the Steele mortgage of January 14th, 1873, was given in substitution of the former one (of June 26th, 1872), which was cut off by the sale under the judgments, the liens of which were prior to the lien of that mortgage. The debt which the mortgage of June 26th, 1872, was given to secure was the debt of Merselis, and not of his wife. She bought the stone house property, on which that mortgage was, at the sheriff's sale, merely to save the security of Steele under that mortgage. She testifies that Steele asked her to buy the property in order thus to protect his security, and she promised him that she would do so, and gave instructions, accordingly, to have the property bought in for her at the sheriff's sale. After she bought the property, she, although she appears to have been under no obligation to do so, merely at Steele's request, gave him a new mortgage (the mortgage of January 14th, 1873), for the same amount, and in place of that of 1872. She swears that she never owed Steele anything, and that, if it had not been for her promise to him, she would not have given nearly so much as she did for the property at the sheriff's sale.

In his answer, Steele, though he refers to the mortgage of 1872, makes no claim under it, and does not state what the consideration of the subsequent mortgage was. He merely says, on that point, that Jacob and Jane Merselis, having become indebted to him, gave him their bond and the mortgage of 1873. Though his counsel was notified to produce the bond given in 1872 (he himself resides out of

Kipp v. Merselis.

this state), it was not produced. Steele was not sworn as a witness in the cause. Merselis testifies that that bond was not signed by his wife. There does not appear to have been any reason why Mrs. Merselis should have purchased the stone house lot at the sheriff's sale, except to redeem her promise to Steele; for it is alleged, on behalf of Steele himself, that the amount due on the mortgages upon it exceeds its value. In order to purchase her husband's interest in the stone house lot, it was necessary to bid for his interest in the frame house lot also; for the sale was not of his interest in each lot separately, but of his interest in the whole property. He had no interest in the frame house lot. The money paid by her to the sheriff for all the property sold was but a few hundred dollars more than the amount of the judgments which were a lien upon the stone house lot prior to Steele's mortgage. When the frame house lot was conveyed to her, in 1867, there were but two mortgages on the whole property, the complainant's and Lum's, and she had an equity to have the stone house lot, which her husband then owned, first sold to pay them, before recourse to her lot. The Mandeville mortgage was on the stone house lot alone, and was given after the deed to her for the other lot had been recorded; and so, too, of the Steele mortgage. She had no need to buy the frame house lot at the sheriff's sale, for, as already stated, she had title to it, by conveyance, long prior to the recovery of the judgments. To hold, under the circumstances, that she, by reason of her having purchased the property at the sheriff's sale, has, as between her and Steele, or even as between her and Mandeville, forfeited her previous equity as owner of the frame house lot, would in no respect be equitable, but the very reverse.

Steele insists that the record of his mortgage was notice to Kimble of his equity. To this it is a sufficient answer to say that Steele has no equity as against the frame house lot in the hands of Mrs. Merselis or her grantee or mortgagee. To protect Steele's mortgage security, she, at a cost of

Locker v. Riley.

\$2,500, purchased the stone house lot. Had she given no new mortgage, the claim now made by him would, of course, not have been made, for his security would, in that case, have been irretrievably gone. He is indebted to her generosity for his mortgage. Because she, at his request, and merely for his benefit, voluntarily and without any manner of consideration, executed a new mortgage in his favor, he now insists that he has an equity to deprive her of her property to pay his mortgage debt. His claim is not only utterly devoid of equity, but to allow it would be to perpetrate most palpable injustice.

SARAH LOCKER and others, executors,

v.

SAMUEL RILEY and others.

Two lots, designated as 19 and 21, were mortgaged by R. to L., and represented by R. as having no prior encumbrance thereon. In fact, 19 was covered, together with other lots, by a prior mortgage, and was subsequently sold thereunder. R. promised to protect the equity of L. (who died before the foreclosure sale), and bought 19, accordingly, at that sale. After the delivery of the master's deed to R., he mortgaged 19 to E.—*Held*, that E. was chargeable with notice of the record of the foreclosure suit, from which it appeared that L.'s mortgage was not satisfied, and also, with notice of L.'s equity against R. by way of estoppel, and—*Held*, also, accordingly, that L.'s mortgage is prior to E.'s, but that in satisfying it 21 must be sold before 19.

Bill to foreclose.

Mr. W. Brinkerhoff, for complainants.

Mr. H. Traphagen, for defendant Evarts.

Locker v. Riley.

THE CHANCELLOR.

On the 1st of December, 1873, the defendants, Samuel Riley and his wife, mortgaged, by their mortgage of that date, to Thomas Locker, now deceased, two lots of land, known as Nos. 19 and 21, in block 136, on a map of the Wakeman property, in Jersey City, to secure the payment of Riley's bond of that date, to Locker, conditioned for the payment of \$5,500 on the first of December, 1880, with interest payable half-yearly; which sum of \$5,500 Locker had lent to Riley. When the mortgage was given, Riley assured Locker that the premises were free from encumbrance. Subsequently, in 1874, the executors of Charles G. Sisson, deceased, filed their bill in this court to foreclose a mortgage which was on lot No. 19 and other lots, but not on lot No. 21, and which was prior to that given by Riley to Locker. Locker was made a party to the foreclosure suit in respect of his mortgage. He interested himself about the protection of his claim therein, and to that end in the establishment of his equity in respect to the order of sale of the premises to raise the money due on the Sisson mortgage; and he provided the money which might be necessary to enable him to buy lot No. 19, if it should be sold. He died, however, before the foreclosure sale. It appears that he relied, too, on Riley, who assured him, and apparently truthfully, of his efforts to protect Locker's mortgage claim under the foreclosure, and gave him assurance also, of his expectations of success. At the sale by the master, under the foreclosure, which sale took place on the 19th of October, 1875, the lot was bought by Riley (Locker was then dead; he died on the 12th of July, in that year) for \$130. The master conveyed the property to him by deed dated October 19th, 1875, but not acknowledged until the 6th of November following. On the 3d of November, 1875, three days before the master's deed was acknowledged, Riley mortgaged lot No. 19 to Daniel R. Evarts, to secure the payment of \$1,500, and afterwards, and on or about the 19th of September, 1877, conveyed the property to Ann Irving. It

Porter v. Trall.

was admitted, on the hearing, that she subsequently reconveyed the property to him.

The question presented for decision is, as to the priority of the complainant's mortgage and Evarts's mortgage upon lot No. 19. Evarts, when he took his mortgage, had notice of the master's deed, and of all the proceedings in foreclosure on which it was based. He had notice that Riley himself was the owner of the mortgaged premises when the foreclosure proceedings began, and that the complainant's mortgage was given by him on the property, and that it was not yet due, was uncanceled of record, and was unpaid. He had notice, therefore, that on the purchase of the property by Riley, that mortgage would be a subsisting encumbrance on the property in Riley's hands. Under those circumstances he took his mortgage with notice of the encumbrance of the complainant's mortgage thereon.

The complainant's mortgage is, therefore, entitled to priority over that of Evarts, but lot No. 21 must be first sold to pay the former.

WILLIAM A. PORTER and others, executors,

v.

RUSSELL T. TRALL.

1. A non-resident testator held a mortgage on lands in the county of B., in this state.—*Held*, that the mere filing of an exemplified copy of his will in the surrogate's office of B. county, does not qualify the executors to maintain suit to foreclose such mortgage, their right being objected to in the answer. They should take out letters testamentary.

2. *Query*, Whether a corporation can be an executor in New Jersey?

Bill to foreclose. On final hearing on pleadings and proofs.

Porter v. Trall.

Mr. G. S. Cannon, for complainants.

Mr. J. Buchanan, for defendant.

THE CHANCELLOR.

The complainants, William A. Porter and "The Fidelity Insurance, Trust and Safe Deposit Company of the City of Philadelphia," as executors of Charles Macalester, deceased, late of Philadelphia, filed their bill to foreclose a mortgage on land in Burlington county, given by the defendant to Mr. Macalester. By their bill they state that they have proved the will in the state of Pennsylvania, and have duly taken upon themselves the burthen of the execution thereof. They also state that they have filed a true copy of the will, duly exemplified, in the surrogate's office of Burlington county; but they do not state that letters testamentary have been issued to them in this state, and, indeed, they admit that none have been. By his answer the defendant, among other things, sets up the defence that the complainant company is not, because it is a corporation aggregate, capable of being an executor; and that, if it be conceded that it is capable, the complainants are not authorized, by the laws of this state, to bring this suit.

It is not necessary to consider the question of capacity. It is clear that the probate granted in Pennsylvania does not qualify the complainants to bring this action. *Clymer v. James (I. H. Williamson, C.)*, Oct. 1824; *Pelletreau v. Rathbone*, Sax. 331; *Normand's adm'r v. Grogard*, 2 C. E. Gr. 425; *Story's Conf. of Laws* § 513. The complainants, however, insist that, inasmuch as the will is recorded in this state, the complainants may maintain this suit, without having obtained letters testamentary here. This is an error. The provision of the twenty-fourth section of the orphans court act (*Rev. p. 757*) that the record of a foreign will admitted to probate by exemplification as provided in that act, and duly certified copies thereof, shall be evidence in the same manner, and have the same force and effect, in all

Probasco v. Probasco.

courts of law and equity, as such record or copies would have if the will had been proved in the usual manner under the laws of this state, cited and relied upon on the hearing, manifestly gives no support to the position.

The bill will be dismissed, with costs; but, of course, without prejudice to the commencement of a new suit by a representative or representatives of Macalester duly authorized so to do.

ALEXANDER PROBASCO, SR.,

v.

ALEXANDER PROBASCO, JR., and others.

A bill was filed by a father to set aside, on account of duress, a conveyance to his children of all of his property, valued at \$45,000, by which he reserved to himself an annuity of \$1,200, which had not been paid, but had been withheld by the defendants from the commencement of the suit, and on which he depended wholly for support.—*Held*, that, unless the arrears of the annuity were paid, a receiver would be appointed, and that before answer filed, and notwithstanding the allowance of a demurrer to the bill, which, however, was only for a defect as to parties.

Bill for relief. Motion for the appointment of a receiver.

Mr. R. S. Kuhl, for the motion.

Mr. G. A. Allen, *contra*.

THE CHANCELLOR.

This suit is brought by the complainant to set aside, on the ground that they were fraudulently obtained from him, two instruments of writing made by him by which he conveyed to his children all his property, reserving to himself

Probasco v. Probasco.

only the use of one of his houses for life, and an annuity of \$1,200 for his life, charged on his real estate. The property is valued at \$45,000.

The bill alleges that his children have divided among them a very large part of his personal property, valued at about \$35,000, and have either spent it or invested it for their own benefit. It further states that they refuse to pay the annuity, and have left him to charity for the necessities of life. They have not answered the bill, but filed a general demurrer. It was sustained, indeed, but only on the ground of the want of certain necessary parties. They insist that a receiver ought not to be appointed before the coming in of the answer.

The injunction has been modified so as to permit their solicitor to collect the rents of the real property, but he is required to hold them, when collected, subject to the order of this court. It would be a reproach to the administration of justice if the defendants were permitted to punish the complainant for seeking relief against them by withholding from him the annuity which is his only means of support. They might thus, through his necessities, compel him to abandon his suit, however meritorious, and to submit to wrong, however flagrant. The rents of the real property amount, it is said by the defendants' counsel, to only about \$400 a year. It is admitted that the defendants have not paid the annuity since the commencement of this suit, nor do they question their liability to pay it. The rents from the real property will be ordered to be paid over to the complainant, and unless the defendants, without delay, pay to him the balance of the amount of the arrears of the annuity after applying the rents thereto, a receiver will be appointed. It is the manifest duty of the court to protect the complainant in the premises. At the same time it will not disregard the rights of the defendants by condemning them unheard. They have all the complainant's estate. If the instruments under which they claim it were, indeed, fairly obtained, they are undeniably bound to pay the annu-

Ennis *v.* Hutchinson.

ity; and, under the circumstances, it is but simple and obvious justice (not to speak of their filial duty) to require them to pay it during this litigation. The motion for a receiver will, therefore, stand over.

GEORGE W. ENNIS*v.*

MAHLON HUTCHINSON and others.

A yacht was built and owned by four persons, under a written agreement that S. was to be the general manager at B., and C. the treasurer and disburser at P. The yacht was built at B., and delivered at P. to E., the complainant, who furnished one-fourth of the contract price. Afterwards, without E.'s knowledge, the yacht was taken by S. from P. to B., and there, in E.'s absence, and without his knowledge, certain liens were filed against her, some of which were for work included in the contract for building, and others for alleged services or claims of S. and the other part-owners. Under these claims the yacht was sold at sheriff's sale and bought by S.—*Held*, that S. must, under the circumstances, be decreed to hold the yacht in trust for all of her owners, and that she be sold under the direction of this court, in order that a partition with due adjustment and allowance of claims of the owners may be made among them.

Bill for relief. On final hearing on pleadings and proofs.*Mr. C. Ewan Merritt*, for complainant.*Mr. G. S. Cannon*, for defendant.

THE CHANCELLOR.

On the 5th of November, 1875, an agreement, in writing, was made between the complainant, Edward L. Stewart, John L. Bryant and Thomas Carstairs, by which they asso-

Ennis v. Hutchinson.

ciated themselves together in the construction and maintenance of a steam yacht, for profit and pleasure. Their shares in the vessel, when constructed, were thereby declared to be as follows: Stewart and Carstairs each two-sixths, and Bryant and the complainant each one-sixth. It was provided that no member of the association could sell or dispose of his interest without the agreement, in writing, of each and every other member. By the agreement Stewart was constituted and appointed manager of the interests of the association at Bordentown, and Carstairs treasurer, at Philadelphia, and it was declared to be the duty of the latter to keep correctly all the books and papers, which were at all times to be at the disposal of the members for inspection; that all moneys were to be paid to the treasurer, whose accounts were to be audited by the members, and all bills were to be contracted and paid by him. The vessel was built at Bordentown, by Holmes, Shaw, Brown & Co., and was delivered to the complainant, who, on the delivery, paid to them \$450 in full for the balance of the contract price, except \$33.52. The cost of the vessel, according to the contract originally made, was \$4,400, but additions and alterations were made, by which the cost was increased. The complainant alleges in his bill, and it is not denied by the answer, that of the original contract price he paid one-fourth, \$1,100.

It appears that the enterprise was not successful. In the absence of the complainant, and without his knowledge, the vessel was taken, by Stewart, from Philadelphia to Bordentown, and, after she had been there about a month, proceedings were instituted against her under the act "for the collection of demands against ships, steamboats and other vessels," by Michael McGovern, who claimed that there was due to him the sum of \$117.50, for painting done in the construction of the vessel. Under these proceedings a claim of \$92 was proved and put in by Charles D. Whittaker, and Stewart, Bryant and Carstairs also proved and put in claims. Those of Stewart amounted to \$901.50; that of Bryant was for

Ennis v. Hutchinson.

\$497.91; and that of Carstairs was for \$160. The vessel was sold by the sheriff, under the proceedings, and bought by Stewart for \$1,434. He still holds her, and claims to be absolute owner of her. The complainant filed his bill to prevent distribution of the proceeds, and to obtain a decree that Stewart holds the vessel in trust for the complainant and the other owners thereof.

Of the claim of \$117.50, on which the proceedings were commenced, \$65 were for work (painting) which was included in the original contract price for the vessel, the balance of which, as before mentioned, was, except \$33.52, paid to Holmes, Shaw, Brown & Co., by the complainant, on the 24th of June, 1876. That work was done by the claimant, not for the owners of the vessel, but for Holmes, Shaw, Brown & Co. Stewart, in his testimony, says "the contract made with Holmes, Shaw, Brown & Co. included the work done by McGovern." Bryant testifies that the contract included the painting. There is room for suspicion, seeing that out of the \$1,768.91 of claims proved against the vessel under the proceedings, all except \$209.50 were put in by three of the owners of the vessel for their expenditures on or in connection with the vessel, that, so far as those owners were concerned, the proceedings were amicable, at least, if they were not, indeed, taken by their procurement, or at their instigation or instance. It appears that Bryant and Stewart were dissatisfied, because, as they alleged, the complainant and Carstairs failed to pay their shares of the expenditures made by the former for or in connection with the vessel, and Stewart, to whom she had been delivered by Bryant, took her to Bordentown.

The bill alleges that the associates were partners in the construction and equipment and use of the vessel, and the answer admits it; but apart from that, if the owners be considered merely tenants in common of her, equity requires that Stewart shall not, under the circumstances, have the benefit of this purchase. If the proceedings were *in invitum* (which does not by any means appear), the rela-

Ennis v. Hutchinson.

tion between the parties would prompt the court to relieve the complainant if it could equitably do so.

The complainant swears that he had no notice of the sale; that his business is that of a traveling salesman, and he is absent from home most of the time; that when he left home he had paid all that he was required to pay; that he was absent from home, traveling through the east and west, from January 1st, 1877, to about the 1st of April, following; that when he left home the vessel was lying at the Alms House wharf, on the Schuylkill river; that she was then in charge of Bryant, and he advised the latter to take her to Cramp & Sons' ship-yard and leave her there for sale; that he made the same request of Carstairs, the treasurer; and that he never had notice of any kind that there was to be a sale of the vessel, or that any one had a lien upon her; that he requested Stewart to meet him at the treasurer's office, at any time he might designate, and have all matters settled, but that Stewart never responded; that there was no agreement that Stewart should have pay for superintending the construction of the vessel, for which he charges in his claim, proved as before mentioned, \$280; that it was never mentioned; that he has no knowledge of any bills against the vessel for construction, fitting out or equipment, and has no knowledge of any of the claims proved before the commissioner. The enterprise, as before remarked, appears to have been a failure, and the vessel seems not to be suited to business other than that for which she was designed. It is probable that she brought, at the sheriff's sale, as much as could have been got for her at public, and, perhaps, at private sale, but the method which Stewart, Bryant and Carstairs have adopted, or of which they have availed themselves, of obtaining satisfaction of their claims by means of proceedings under the act, cannot, for various reasons, be approved. The complainant has a right to contest those claims.

Stewart will be declared to hold the vessel in trust for himself and the other owners. She will be sold, under the

Cook v. Chapman and Cook.

direction of this court, for the benefit of the owners, to the end that partition may be made, and there will be an account to ascertain the amount to which each is entitled out of the proceeds.

ANDREW D. COOK

v.

GEORGE M. CHAPMAN and JARED R. COOK.

The bond given in this case, under the forty-sixth rule as it stood originally, upon issuing an injunction to restrain the further prosecution of certain attachment suits (which had reached judgment) in West Virginia, was declared forfeited, it appearing that the complainant had no equity whatever, but had imposed upon this court by instituting a suit in which the West Virginia defendants were the real actors, and whose sole object was to defeat the judgment obtained against them in West Virginia.

On petition of the defendant George M. Chapman, that the sureties in a bond given in this cause, under the forty-sixth rule, be ordered to pay the amount of the penalty of the bond into court, and that the petitioner may be paid thereout the amount of his damages sustained by reason of the injunction.

Mr. T. N. McCarter, for the petitioner.

Mr. J. Henry Stone, for the sureties.

THE CHANCELLOR.

On granting the injunction in this cause, the complainant was required to give bond to the defendant Chapman, according to the forty-sixth rule, with sufficient sureties, in the penalty of \$75,000, and it was given accordingly.

Cook v. Chapman and Cook.

Chapman subsequently answered the bill, and not long afterwards, the cause having proceeded no further than the answer, the bill was dismissed, with costs, by consent of the complainant.

The suit was brought to restrain Chapman from further prosecuting certain attachment suits which he had instituted against the Pittsburgh and Steubenville Railroad Company, in his own name, in West Virginia, and in which he had recovered a judgment for \$298,081.26, the suits having been consolidated.

The bill alleged that those suits were founded upon pecuniary claims, of large amount in the aggregate, due to the complainant and the defendant Jared R. Cook, as the firm of J. R. Cook & Co., and which had been placed in Chapman's hands by them merely for collection; that Chapman had, by fraudulent conspiracy with the defendant Cook, and with a view to defrauding the complainant, obtained, from the former, assignments of the claims, and thereupon had brought the suits in his own name; and that he wholly denied that the complainant had any interest in the claims or suits; and the bill alleged that he was therein abetted by the defendant Cook, in pursuance of their combination to cheat the complainant. The bill also alleged that Chapman had collected, in New York, another claim of large amount, belonging to the firm of J. R. Cook & Co., against J. Edgar Thomson, and had appropriated the money to his own use. It prayed that he might be restrained from proceeding in the suits in West Virginia, and from collecting the claims on which they were based, and might be required to account for the money received in the Thomson suit, and that a receiver might be appointed to manage the West Virginia suits, under the direction of this court, and that Chapman might be required to make all assignments necessary to invest the receiver with full power in the premises. An injunction was granted and a receiver was appointed, and Chapman was required to assign to him, which he did accordingly.

Cook v. Chapman and Cook.

The question for determination is, whether the complainant was equitably entitled to the injunction. In construing the condition of the bond, the decision in *Smith v. Kuhl*, 11 C. E. Gr. 97, on the construction of such bonds, will be followed, the bond having been given since that decision was made. The inquiry then is, whether the application was made *bona fide*. It is clear, from the evidence, that the complainant sought, by means of the suit, to accomplish a purpose totally different from that which the proceedings themselves indicated. He, by his bill, prayed that Chapman and the defendant Cook might be restrained from prosecuting the suits in West Virginia, and that a receiver might be appointed to manage, control, collect and compromise the claims, judgments and decrees therein against the Pittsburgh and Steubenville Railroad Company, under the direction of this court; but the real object was to foil and defeat Chapman in the suits, to the end that the claims themselves, which the complainant says were just, might be utterly defeated. The complainant himself, in fact, neither expected nor sought any relief in the action. Except as he appeared upon the record, he was a stranger to the suit. The real defendants in the West Virginia suits were the Pennsylvania Railroad Company, and, beyond all dispute, this suit was theirs. It was merely one of the methods of defence which they adopted against the claims which Chapman was prosecuting. It was, in fact, not the complainant who applied for the injunction, but they who appeared in his garb, borrowed for the occasion. It was they who instituted the suit, and who employed and paid the solicitor and counsel who acted on behalf of the complainant. It was they who furnished the sureties in the bond under consideration, and it was they who furnished the funds for the receiver. They paid all the expenses of the suit, even furnishing traveling passes to the complainant when on business connected with it. When the solicitor whom they had employed to bring the suit declined further to act in it, it was they who undertook to employ another

Cook v. Chapman and Cook.

in his stead. It is not alleged that they were actuated by motives of benevolence. Their object is apparent, and is avowed. Their counsel, in his testimony, says that one of the reasons why they brought the suit was that, under the proceedings in it, there might be developed further testimony which would be of service to them in the West Virginia suit. He says that after he got from the complainant the letters, copies of which were appended to the bill, he sent printed copies of them to the railroad company's counsel in West Virginia, as the basis of an application to open the judgment to admit newly-discovered testimony, and that it was after that that this suit was begun. He says that he suggested this suit himself, and that it was really part of the proceedings in West Virginia. The complainant, in answer to questions as to the object of this suit, testifies that the counsel of the railroad company said that, if this suit was successful, it would "kill the Virginia suit," and that the effect would be that Chapman would be out of court, and would have to give up the suit. The object is further shown by the testimony of the complainant, in which he is corroborated by the counsel of the company, that if this suit was successful the complainant was to trust for his compensation, not to any legal demand upon the company, but to their generosity merely. It is true, he says, he understood, at one time, that he was, in case of success, to have \$60,000 from the railroad company, but the counsel of the company positively denies that there was any ground for that or any such understanding, and the complainant testifies that the most of the conversation on the subject of the advantage which he would derive from the success of this suit was indefinite, and that the counsel of the railroad company said he would not promise to pay them (the defendant Cook and himself), or that he could not promise to pay them, one cent, and that they would have to trust to the generosity of the company. The defendant Cook never co-operated with the complainant in this suit.

Cook v. Chapman and Cook.

But it is urged that the complainant, in placing himself in the hands of the company, was honestly seeking what he regarded as his right, and that this court, in granting the injunction and appointing the receiver, adjudged, on the facts then presented, that the complainant was entitled to the injunction. The court, however, to guard against want of *bona fides* in the application, required the bond on granting the injunction, and it cannot be doubted that, had it been aware that the real defendants in the suit in West Virginia were the real complainants here; that it was they who were the real applicants for injunction, and that the suit was brought to subserve their purposes, and, though ostensibly brought merely to protect the complainant's interest in the large, and, so far as appears, just, pecuniary claims against the company therein mentioned, it was actually instituted to defeat those claims, and so to deprive not only Chapman, but the defendant Cook, of all benefit of them, to the sole advantage of the railroad company and the complainant, through an understanding between them, no injunction would have been granted. "He who comes into a court of equity must come with clean hands." The principle of this maxim is applicable to him who asks the aid of the court for sinister purposes.

It is worthy of remark that, in this case, according to the answer, the judgment which Chapman was, by the injunction, restrained from collecting, included a claim of about \$100,000 in his favor, in nowise derived from the complainant or the defendant Cook, or the firm of J. R. Cook & Co., and in which Chapman alleges, in the answer, neither that firm nor either of the Cooks ever had any right or interest, and to which they never had any claim. Again, the evidence shows an unsuccessful effort, on the part of the complainant, to induce the defendant Cook to further the object of this suit by answer and testimony, and that a solicitor was provided by the railroad company to prepare and put in that answer.

O'Neill v. O'Neill.

Whatever ground of complaint the complainant may have had against the defendants, and however meritorious his cause of action, his method of obtaining redress was reprehensible. He did not invoke the aid of this court for himself, but permitted others to come here in his name, and set up his grievances ostensibly, and only ostensibly, in his behalf, in order that they might thus obtain the means of defeating a judgment against them in which he claimed to have an interest adverse to them. And the result of this suit, if successful, was to have been, not his participation in the fruits of that judgment, but the defeat of the judgment; and he was to receive a gratuity at the hands of the judgment debtors in recognition of the service he had rendered them in enabling them to get rid of the judgment without paying it.

The bond should be declared to be forfeited, and the damages sustained by Chapman, by reason of the injunction, ascertained in this court. There will be a reference to a master accordingly. I do not deem it necessary to require the sureties to pay the amount of the penalty of the bond into court.

ROSA O'NEILL

v.

DANIEL O'NEILL.

1. Where, in a suit for a divorce for gross cruelty, the testimony of the defendant in regard to his own conduct, as well as other matters, is shown to be untrue, his protestations of repentance and future reformation can not be entertained as a ground for refusing such divorce.

2. *English v. English*, 12 C. E. Gr. 579, distinguished.

Bill for divorce from bed and board for extreme cruelty.
On final hearing on pleadings and proofs.

O'Neill v. O'Neill.

Mr. J. M. Scovel, for complainant.

Mr. C. T. Reed, for defendant.

THE CHANCELLOR.

The parties to this suit were married January 6th, 1875, and from that time to this have resided in Camden. The bill was filed June 29th, 1877, to obtain a divorce *a mensa et thoro*, on the ground of extreme cruelty. By it the complainant alleges that ever since the marriage her husband has treated her with great brutality, and she mentions therein several instances of his ill-treatment. She states that in December, 1876, he violently seized and choked her; that on the 4th of June, 1877, he struck her and knocked her down, so that she fell violently to the floor; and that in July, 1877, he kicked her in the back, and, by his violence of action and language to her, compelled her to hide herself from him in the cellar; that he is habitually intoxicated, and when intoxicated is violent and dangerous; that his assaults upon her were, when the suit was begun, increasing in brutality, and were becoming more frequent, and that she has been compelled to go to the house of one of her neighbors to sleep, because of her fear of her life from his violence.

Though, by his answer and in his testimony, he denies that he has ever laid violent hands upon her, the proof shows clearly that he has frequently, since their marriage, treated her with great cruelty. He is a large and physically powerful young man, and is a blacksmith by trade. She is a small and feeble woman. Though he swears that he never struck her; that he never laid his hand on her, in anger, in his life, and that he never, knowingly or intentionally, hurt her, or treated her cruelly, it appears that he has been indicted for assault and battery upon her, and convicted thereof. She swears that he began to ill-treat her soon after their marriage; that he applied to her the most abusive, vile and offensive epithets, and that he continued his abuse of her down to the time when she was sworn as

a witness in this suit; that in December, 1876, without cause or provocation, he choked her, and hurt her, and that she caused his arrest for it; that in July, preceding, he kicked her; that on the 4th of June, 1876, he knocked her down; that on that occasion he threw her on the floor twice, and raised a chair to strike her, declaring that he was going to kill her, and she further testifies that about the 1st of May, 1877, he caught hold of her hands and held them together and called for a butcher-knife, with which to kill her; that she escaped from him, but that he sprained her arm, so that she could not use it for a week; that he has driven her into the street, and that she has been frequently compelled to hide herself in the cellar to escape his violence, and through fear for her life. The time stated in the bill as that on which he kicked her, July, 1877, is evidently an error as to the year; for the bill was filed in June, 1877. She swears that he is a dangerous man when he is drunk, and that he is generally drunk. She is fully corroborated in her statements by the neighbors, and those who lived in her family.

Mrs. Faucell, who lived in the next house to the complainant, swears that on the 4th of June, 1877, she saw the defendant knock the complainant down on the floor; that he pushed her to the floor violently, and then closed the door; that the witness and her husband were, at the time, standing on the stoop of the complainant's house, and that when she saw the complainant again (which was in a few minutes afterwards) she was bleeding at the eye. She says that whenever the defendant was drunk he threatened the complainant's life, and the lives of the witness and her husband, also. She further says that he applied to the complainant the vilest epithets.

Albert Faucell, her husband, testifies that some time before Christmas, in 1876, he saw the defendant take the complainant by the neck and choke her; that she screamed, and he then let go of her and she escaped from him, crying "murder," and hid herself from him in a closet; that the

O'Neill v. O'Neill.

prints of his fingers were on her neck; that he has seen him drag her out from behind the bar in the saloon which she kept in the house (which was owned by her) in which the complainant and the defendant lived; that she has sometimes come to the witness's house, because she was afraid to stay in her own; that on the occasion of which his wife spoke, in June, 1877, he saw, through the window, the defendant raise a chair to strike the complainant; that the witness knocked at the door, and then all was quiet, and that soon afterwards the complainant appeared, with her face covered with blood, and begged that some one would go for a police officer, and the witness went and got one, and the defendant was arrested. This witness says that the complainant never, as far as he knew, gave the defendant any provocation, and that she always behaved herself properly towards him, and that the defendant was always in a drunken condition.

Robert Staegel swears to the complainant's injuries after the occurrence of June, 1877, just spoken of, and he says that in December, 1876, the defendant was arrested and taken before a justice of the peace for assault and battery on the complainant on the occasion when he choked her, and that the defendant besought the complainant not to press the charge against him. He says her neck was then very much swollen.

A witness to the transaction of the 1st of May, 1877, swears that the defendant then had a large knife in his hand, with which he threatened to cut the complainant's throat. There is evidence that the defendant, in July, 1876, dragged the complainant out of bed by the hair of her head, declaring, with brutal and profane expressions, that he would not have married her if he had not been drunk when he did it, and that he only married her for her money. On that occasion the complainant escaped from him and hid herself in the cellar.

I deem it unnecessary to pursue the testimony in the case further. It is abundantly clear that the defendant has been

O'Neill v. O'Neill.

guilty of extreme cruelty towards the complainant, and that she cannot safely live with him. His denials in his testimony are of no weight against the testimony of so many witnesses; and the testimony of his friends and acquaintances, as to his general character for sobriety and peaceableness, is of no avail against the positive proof of his grossly intemperate habits, and of his repeated acts of brutal violence towards his wife, and the evidence which his conviction upon indictment for assault and battery upon her furnishes. And, besides, it is part of the history of this case, that she has been compelled, during the progress of this suit, to appeal to this court for protection against his violence, and to pray that the interdict of this court might be interposed for her defence.

His counsel urged, upon the hearing, that the defendant was desirous that his wife should continue to live with him; that he expresses affection for her, and promises that, if the divorce be denied, he will for the future treat her with kindness, and he urges that, therefore, on the authority of the court of appeals in *English v. English*, 12 C. E. Gr. 579, the divorce should be denied. But the action of the court in that case was clearly exceptional. It cannot be held to govern this. A decree of separation for such cruelty as the evidence in this case shows, cannot be averted by mere promises of amendment. It is worthy of remark, in this connection, that with a view to establishing his pecuniary ability to support his wife, the defendant testified, on the 25th of March of the present year, that he was the owner of property worth from \$5,000 to \$6,000; that he had a shop of his own in Camden, in which he employed six or seven men in the busy season, and that his business was a steady and established one; that for the last two years his business had, he thought, produced him \$2,000 a year, above all expenses; that in three years he had lost but four or five days from his work, and those were lost through his illness, and that in good times he could make \$10 a day by his own labor; and yet, when this cause came on for hearing (in October

Johnson v. Helmstaedter.

following), he alleged, by his counsel, as a reason why the testimony on his part had not been filed, that he was unable, from sheer poverty, to pay the fees of the examiner (about \$35) for taking it, and his counsel stated that he was, of course, utterly unable to pay for printing the testimony, or any part of it. The rule requiring that the testimony be printed was, therefore, in consideration of his alleged poverty, not applied to the case, and the cause was heard on the testimony in manuscript. Nor did the defendant claim that he has lost his property since he testified. It may be added that he has not been required to pay either alimony or counsel fees in this suit. It is impossible to resist the conclusion that his protestations and promises and denials, are alike insincere and untrustworthy.

There will be a decree for divorce, according to the prayer of the bill.

FINLEY A. JOHNSON, assignee,

v.

ADAM HELMSTAEDTER and others.

1. In pleading, a statement of matters of fact in the form of charge, is sufficient, on general demurrer, where it is evident that a statement by way of allegation or averment was intended by the pleader.

2. An assignee in bankruptcy may sue in this court to recover property conveyed by the debtor to defraud his creditors.

Bill for relief. On general demurrer.

Mr. S. Kalisch, for the demurrant.

Mr. F. A. Johnson, in pro. pers.

Johnson v. Helmstaedter.

THE CHANCELLOR.

The bill is filed by the assignee in bankruptcy of Christian Sauerwein, against Adam Helmstaedter and Sauerwein's wife. It states that Christian Sauerwein and William Sauerwein were duly adjudicated bankrupts by the United States district court for the district of New Jersey, on petition of their creditors, on the 13th of January, 1877; that on the 20th of February following, the complainant was duly appointed their assignee in bankruptcy, and that an assignment of all their property was then made to him. It further states that Christian Sauerwein, and Eva, his wife, on the 8th of July, 1876, by deed of that date, conveyed to Helmstaedter a lot of land therein described, situated in Newark. It *charges* that that conveyance was made without consideration in law or in fact, and for the purpose of placing that land out of the reach of Christian Sauerwein's creditors. It further states that Helmstaedter, on the 8th of November, 1876, conveyed the property to the defendant Eva Sauerwein, and it *charges* the truth to be that that conveyance was also without consideration in law or in fact, and was made for the purpose of transferring the title to the property to Sauerwein's wife, for the purpose of defrauding the creditors of the bankrupts; and that the property ought to be decreed by this court to be the property and estate of Christian Sauerwein, or of the complainant as his assignee; and that the title ought to vest in the complainant, as such assignee, for the benefit of the creditors of the bankrupts.

The defendants demur to the bill for want of equity.

There are facts stated and averments made sufficient, if established by proof, to warrant a decree in favor of the complainant. It is alleged, in the stating part of the bill, that the conveyances which it seeks to set aside as fraudulent, were without consideration, and were made for the purpose of transferring the title of the property to Eva Sauerwein, to defraud the creditors of the bankrupts. Though the word "charge" is used, yet it is evident that the pleader

Groton Savings Bank v. Batty.

intended to allege or aver the fact. No objection was made on the argument to the form of the averment, but it was urged that it is not sufficient, because no facts are stated. It is enough to allege that the deeds were without consideration, and were designed merely to defraud creditors, and the defendants will be bound to answer the averment. A general charge or statement of the matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proof. *Story's Eq. Pl.* § 28; *Nesmith v. Calvert*, 1 *Woodb. & M.* 34; *Rogers v. Ward*, 8 *Allen* 387; *Houghton v. Reynolds*, 7 *Jur.* 414.

The defendants insist that the complainant cannot, merely as assignee in bankruptcy, maintain an action to set aside conveyances of property made by the bankrupt in fraud of his creditors. But this position cannot be maintained. An assignee in bankruptcy is expressly vested with the title of the bankrupt in all the property conveyed away by the latter in fraud of his creditors. *Bankrupt Law* § 14. And, as representing creditors, he may sue for such property in equity. *Carr v. Hilton*, *Curt.* 230; *Bump on Fraud. Conv.* 519, 520; *Bradshaw v. Klein*, 7 *Am. Law Reg. (N. S.)* 505; *Ward v. Van Bokkelen*, 2 *Paige* 289. And such suits may be maintained in the state courts. *Cook v. Whipple*, 55 *N. Y.* 150; *Ward v. Jenkins*, 10 *Metc.* 583; *Mays v. Manuf. National Bank*, 64 *Pa. St.* 74.

The demurrer will be overruled, with costs.

THE GROTON SAVINGS BANK

v.

WILLIAM BATTY and others.

1. The principle that the possession of land is notice to others of the possessor's title, is intended to protect only equitable rights, and not to cover the possessor's fraud, or to protect him where he is without equity.

Groton Savings Bank v. Batty.

2. As against an innocent mortgagee, notice from the possession of lands cannot be set up by an occupant who was insolvent when he placed the title in the name of the mortgagor, and knew, soon after the time of the giving of the first of the two mortgages, that it had been given, and did not notify the mortgagee of his claims, but kept silent and permitted the mortgagor to borrow more money of the mortgagee on a second mortgage of the property, whereas if he had notified the mortgagee of his claim when he first was made aware of the existence of the first mortgage, the mortgagee might have collected the mortgage debt of the mortgagor and would have not made the second loan on security of the mortgaged premises.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. G. Collins, for complainants.

Mr. S. B. Ransom, for defendants Lathrop and wife.

THE CHANCELLOR.

The bill is filed to foreclose two mortgages given to the complainants, a Connecticut savings bank, on a lot of land in Jersey City: one by John Batty and William Batty, dated November 1st, 1863, to secure the payment of \$1,000, in one year, with interest; and the other by William Batty (to whom, in 1865, John Batty released his interest in the property), dated October 1st, 1869, to secure the payment of \$2,500, in one year, with interest. Sylvanus Lathrop and his wife were made defendants, because at the time of beginning the suit they were in possession of the mortgaged premises (on which there is a dwelling-house in which they resided), and claimed some title thereto or interest therein. The title to the property was never in either of them.

The premises are part (eighteen feet front by ninety feet deep) of a lot of twenty-five feet front by ninety feet in depth, which was bought, as alleged in the answer, by Mrs. Lathrop, in 1852, from John B. Coles and others. She, however, never took the title. Her husband built the house with his

Groton Savings Bank v. Batty.

own money, at a cost of \$3,000. In 1856, they caused the vendors to convey the property, in fee simple, to James S. Bishop, who was to hold it as security for the repayment to him of the sum of \$1,100 lent by him to them, \$600 of which were used for the payment of the purchase-money of the lot. In August, 1858, Bishop requiring repayment of that money, it was paid to him by the Batties, on his conveying the property to them in fee. In 1853, Mrs. Lathrop purchased of the same vendors a lot of land adjoining the one above mentioned, and, in 1862, she and her husband conveyed it to the Batties for the consideration, as stated in the deed, of \$1,200. It was then vacant. Upon this lot and the unoccupied seven feet of the lot first mentioned, the Batties built two dwelling-houses. One of them they sold, in 1865, to Oramel Whittlesey, for \$6,000, and the other was sold, in 1867, by William Batty (John having, on the same day the conveyance to Whittlesey was made, released to William all his interest in the remainder of the property and in the first-mentioned lot), to Stephen Mueller for the consideration of \$6,660, according to the deed. The deed bears date on the 14th of March, 1867. The Batties furnished all the money for the building of those houses. Lathrop, who was a carpenter, did some work to them, which he estimates as of the value of about \$800. The defence set up in this suit by the Lathrops is, that the conveyances to the Batties, who were Mrs. Lathrop's brothers, were merely by way of mortgage, to secure the repayment of moneys advanced by them, to repay Bishop and to build the houses which were sold to Whittlesey and Mueller, respectively; and that it was agreed, between the Lathrops and the Batties, that the latter should re-imburse themselves out of the proceeds of the sale of the property on which those houses were to be built; that that property was sold and the sale produced enough money fully to repay the Batties; and that, though the legal title to the mortgaged premises was in the Batties when the complainant's first mortgage was made, and in William Batty when the second was given, the Lathrops were in possession

Groton Savings Bank v. Batty.

of the property; and that such possession was notice to the complainants of the equitable rights of Mrs. Lathrop in the property.

Though the lot of which the mortgaged premises was part was bought by Mrs. Lathrop, she paid no money of her own for it, but borrowed \$600 from Bishop (the repayment of which was secured by the deed from Coles and others to him) to pay the purchase-money. She had no separate estate. Her husband, after the purchase of the lot, and before the title passed from the vendors, erected the house upon the property with \$3,000 of his own money. The lot was bought in the fall of 1852 or 1853. The house was finished about the 1st of April, 1854, for he, with his family, then moved into it. He appears to have been unable to pay his debts, for there appear of record against him judgments recovered in the circuit court of Hudson county, early in 1855, for comparatively small sums. One was recovered on the 29th of January, for \$176.74; another on the 12th of February, for \$264.74, and another on the 21st of that month, for \$79.69. His insolvency appears to have continued ever since. In May, 1856, a judgment was recovered against him in that court for \$894.60, and in August following another for \$283.14. On the 30th of January, 1857, another judgment was recovered against him, and it appears that in March of that year he was arrested on civil process and gave bond in the penalty of \$1,400 conditioned to apply for the benefit of the insolvent laws, and he admits that the claim on which he was so arrested has not been paid.

In his testimony, though he says he was not in pecuniary trouble when the deed from Bishop to the Batties was given; that he had got over his troubles—he also says he does not know when he failed; that he had failed before that time; that he had never got out of his trouble, and that he has never settled with his creditors. He also says, that since 1857 he has had no means except what he has earned from day to day, and that there are judgments against him.

Groton Savings Bank v. Batty.

The legal title to the mortgaged premises was conveyed to Bishop, and by him to the Batties, by absolute deed, by the direction of the Lathrops. Though the Lathrops insist that the conveyance was merely by way of mortgage, with a verbal agreement for reconveyance on the payment of the money lent and advanced by the Batties, William Batty (John appears to be incapacitated by disease from testifying) swears that there was no understanding or agreement that the Batties should hold the property as security, but that the agreement was that they would reconvey on being repaid all moneys paid out by them for all purposes in respect of the property, before they should convey to any one else. He further swears that he and his brother bought the property absolutely and unconditionally for the amount of the consideration, \$3,000 (which he says was its full value), expressed in the deed from Bishop, and paid it all; that the first payment was to Lathrop, \$1,000 to \$1,500; subsequently taxes in arrear, water rents and assessments, and afterwards, from time to time, the balance; so that they paid the full amount agreed upon, \$3,000. He swears that they paid to Lathrop and his wife all of the money except taxes, water rents and assessments, and that part of the taxes, water rents and assessments was paid by him through Lathrop and his wife.

It may here be remarked that though Lathrop swears that he himself paid all the taxes upon the property with his own money, it appears that in fact he did not do so. He is able to produce but a single receipt, and that is for the taxes of 1866, which were not paid until 1868. The property was sold for the taxes of the years 1856, 1857, 1858, 1859, 1860, 1862, 1863 and 1865, and redeemed by the Batties, or one of them. The Batties appear to have paid the taxes for 1867, 1868 and 1869. Lathrop admits that he never paid any of the water rents, and assigns as his reason want of money. The evidence of the alleged agreement to redeem depends entirely on the testimony of Lathrop. His wife knows nothing about it. She, indeed, knows but little about the subject of the controversy. She says she forgets whether

Groton Savings Bank v. Batty.

she knew or did not know, at the time when it was given, that Bishop made the deed to the Batties, her brothers; that she never bothered her head about it; that Lathrop told her he was going to make a deed, but she never bothered herself about the business; that her husband always transacted her business, and was her agent in everything, and that he bargained for the lot when it was bought. She cannot tell how much she borrowed from Bishop. She says she does not know what the house cost, nor how much the Batties advanced to her husband, nor how much they lent or advanced to her, nor for what purposes the money was advanced.

The agreement to redeem, on which the claim of Mrs. Lathrop rests, being sworn to by Lathrop alone, and denied by Batty, the fact that the consideration expressed in the deed is \$3,000 may be adverted to, and also the fact that in 1865 the Batties were permitted by the Lathrops to sell and convey as their own property part of the lot conveyed to the Batties by Bishop. It may also be remarked that neither party kept any account in reference to the property. There seems to be great reason to believe that, admitting the claim made by the Lathrops, that the deed to the Batties was merely conditional, recourse was had to absolute deeds to Bishop and the Batties, instead of mortgages, with a view to screening the property from Lathrop's creditors, and with the design of thus concealing what they now insist was the true ownership of the property, and so misleading the public.

The principle (that the possession of land is notice to others of the possessor's title) which the Lathrops invoke, is intended for a shield to protect the equitable rights of those who are entitled to the consideration of equity. It will not be available as a cover of fraud; nor will it be applied against equity. Said the court in *Cook v. Travis*, 22 Barb. 338, 359: "It is a general rule that the possession of land is notice to others of the possessor's title. But it is not universally true; it is merely an inference; it may arise

Groton Savings Bank v. Batty.

in some cases, it may be repelled in others, and in others it may be restricted to some particular claim. The rule, like all rules of circumstantial evidence, must be governed by the particular circumstances of each case, and have a reasonable operation." In the same case, on appeal (20 N. Y. 400, 402), the court enunciated the doctrine as follows: "It is quite true, generally, that the law regards the actual occupancy of land as equivalent to notice, to all persons dealing with the title, of the claim of the occupant. But this is not an absolute proposition which is to be taken as true in all possible relations. The circumstances known may be such that the occupancy will not suggest to a purchaser an inquiry into the title or claim under which it may be held; and when the inquiry may be omitted in good faith and in the exercise of ordinary prudence, no one is bound to make it. Possession out of the vendor and actually in another person, only suggests an inquiry into the claim of the latter. Ordinarily, that inquiry should be made, because it evinces bad faith or gross neglect not to make it. But the question in such cases is one of actual notice, and such notice will be imputed to a purchaser only where it is a reasonable and just inference from the visible facts. He cannot willfully close his eyes and then allege good faith; nor can he pause in the examination where the facts made known to him plainly suggest a further inquiry to be pursued."

In *Williamson v. Brown*, 15 N. Y. 354, 362, the doctrine is thus laid down: "Where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right."

Groton Savings Bank v. Batty.

In *Fassett v. Smith*, 23 N. Y. 252, it was held that the possession by a husband of his wife's real estate is to be taken as her possession, so as not to put a purchaser on inquiry as to the rights of a third person, of whom the husband, to cover his own fraud, took a lease, unknown to the purchaser.

A vendor who, after conveyance of land, remains in possession, will not be protected by his possession in a secret trust existing in his favor in the property in the hands of the grantee; for, by his deed, he has declared to the public that he has no right to the possession. *Van Keuren v. Central R. R. Co. of N. J.*, 9 Vr. 165; *New York Life Ins. Co. v. Cutler*, 3 Sandf. Ch. 176; *Newhall v. Pierce*, 5 Pick. 450; *Scott v. Gallagher*, 14 Serg. & R. 333; *McCulloh v. Cowher*, 5 Watts & S. 427. So, too, one who gives out to the public, for purposes of concealment of his interest in the land, that another person is the absolute, unconditional owner of it, in order that it may be believed that he himself has no title or interest therein, will be held, in equity, to the consequences of his action as against innocent purchasers for value.

In this case, the deed to Bishop and the deed to the Batties, were recorded when the first mortgage to the complainants was given. It is clear, from the testimony of the Lathrops themselves, that they knew of the existence of that mortgage as early as about the month of October, 1866. Lathrop, speaking of a conversation which, he says, took place about April, 1867, testifies on the subject as follows: "I said (to William Batty), 'you have a mortgage to the savings bank for the \$1,100 which you paid out to Bishop and Coles.' He said, 'yes.' I can't tell where I heard it from; I don't know but he told me himself; I know I asked him about it at that time." And, again, he says that John Batty's wife told his wife of the giving of the mortgage, as long as six months, he thinks, before that conversation. Mrs. Lathrop testifies that she knew that her brothers gave a mortgage of \$1,000 to the Groton Savings

Groton Savings Bank v. Batty.

Bank, but cannot remember whether she knew that it was to be given before it was given; that she learned it from her husband.

The Lathrops did not, however, give any notice to the complainants that the Batties had no right to give the mortgage, nor that it was in derogation of the rights of Mrs. Lathrop. Lathrop says the reason was, he did not know it was his duty to do so. Had he informed them of his wife's claim upon the property, they might have recovered the money, for the bond was due, and the Batties, according to Lathrop's testimony, were men of property. He says he "understood that they were well off; that they owned a good deal of shipping, steamboats, &c." Besides, when the Lathrops first heard of the mortgage, only one of the two houses had been sold, and it was not until about five months afterwards that the other was sold. It was sold to Mueller, for \$6,660. Not only was the title to that property in William Batty, by conveyance from the Lathrops to him and his brother, and release from the latter to him, but he had sufficient beneficial interest in it to have secured the complainants from loss on their \$1,000 mortgage. Had they been notified, the complainants would not have made a further loan to William Batty on the security of the property.

The second mortgage, which was for \$2,500, was not taken until 1869. Under the circumstances, it was the duty of the Lathrops to notify the complainants of their claim, after it had come to their knowledge that a mortgage had been given to them by the Batties upon the property. They, according to their own statement, had given to the Batties the means of deceiving the complainants, by professing to be the absolute, unconditional owners of the property. They kept silent as to their claim when they should have spoken; equity will not hear them when they assert it now against those whom their silence has misled.

Not only did they not notify the complainants, but they did not even protest to the Batties, or either of them, against their action in giving the mortgage, nor expostulate

Lehigh Valley R. R. Co. v. McFarlan.

with them on that account, but, on the other hand, they acquiesced. And again, although, in April, 1867, Lathrop, as he testifies, in vain endeavored to obtain an account from and settlement with William Batty, who was then, as Lathrop insisted, overpaid, yet it was not until 1875, eight years afterwards, that he filed a bill in this court to obtain a reconveyance of the mortgaged premises. For all that time (and within it the complainant's second mortgage was taken) he permitted William Batty to remain the absolute and unconditional owner of record of the mortgaged premises; so continuing his power to obtain loans, on the security of the property, from unsuspecting lenders.

The Lathrops, for purposes of their own, clothed the Batties with the garb of absolute, unconditional ownership, and, as between them and an innocent party induced to act on this representation, the loss occasioned thereby must, under the circumstances, fall on them. There will be a decree for the complainants for the amount of both mortgages and the interest thereon.

THE LEHIGH VALLEY RAILROAD COMPANY

v.

HENRY McFARLAN and others.

1. A bill of peace can only be maintained after the complainant has satisfactorily established his right at law, or where the persons who controvert it are so numerous as to render the intervention of this court necessary to save multiplicity of suits.

2. Where several plaintiffs bring different suits at law against one defendant, some for diminishing their supply of water, and another for backing water on his mill-wheel, no ground for interference to prevent multiplicity of suits is shown, although the alleged injuries are done in the use by the defendant of one stream.

Lehigh Valley R. R. Co. v. McFarlan.

Bill for relief. On motion on behalf of all the defendants to dissolve the injunction; on McFarlan's part, on bill and affidavits and answer, and on the part of the other defendants, on the bill, and annexed affidavits. Also, on general demurrer by all of the defendants, except McFarlan.

Mr. H. C. Pitney and *Mr. E. D. Halsey*, for defendants.

Mr. T. N. McCarter and *Mr. F. T. Frelinghuysen*, for complainants.

THE CHANCELLOR.

This is a bill of peace. The complainants are the lessees of the Morris Canal and Banking Company, and as such have, since 1871, operated the canal and other works of that company. The canal crosses the Rockaway river at Dover, and is so constructed that for a short distance the river is used as a part of it. In order to secure sufficient water in the river, at that point, to float the boats at all times during the season of navigation, a dam was built across the river. At the junction of the canal with the river, on the east side of the latter, there is what is called a guard-lock, placed there to prevent the water of the river, when at unusual height, from flowing into the canal below the river on the east, but serving no other purpose. It is usually left open. The defendant McFarlan is the owner of a rolling-mill at Dover, on the river above the dam. The defendants, the Halseys and Beach, are owners of land on the river at Rockaway, below Dover, on which there is, in the river, a natural fall, furnishing water-power by which the machinery of a grist-mill and a saw-mill, and the machinery of an iron forge or bloomery on their land, are driven. The defendant, Van Winkle, is their lessee of the mills, and Hoagland their lessee of the forge.

The complainants have been prosecuted in the supreme court of this state for damages, in several actions which are still pending. Three of them were brought by McFarlan.

Lehigh Valley R. R. Co. v. McFarlan.

In the first no declaration was filed. The other two were brought to recover damages for unlawful flowage of his land, resulting from the maintenance at an unlawful height (as he alleges), by the complainants, of the before-mentioned dam; two others of the suits were brought by the Halseys (in which designation Susan E. Beach is included), for damages to them as owners, for the diversion of water from their before-mentioned land; two others of the suits were brought by the defendant, Van Winkle, for damages to him as tenant of the grist-mill and saw-mill, for the diversion of the water, and two others by Hoagland, as tenant of the forge or bloomery, for damages for injury thereto from the same cause. Of the suits brought by McFarlan, the first was begun September 21st, 1876. The damages therein were laid at \$10,000. As before stated, no declaration has been filed in it, and it is still pending. The second was brought December 30th, 1876. The declaration therein is for damages for the unlawful backing of the water of the river on his land, to the damage of his rolling-mill thereon, from April 1st, 1872; the backing being occasioned, as alleged in one count, by the increasing of the height of the dam, and, in the other count, by continuing the dam at an unlawful height. The damages were laid in that suit at \$10,000. The complainants, after filing the plea of the general issue to the declaration, removed the suit (they being a corporation under the laws of, and located in, the state of Pennsylvania) by petition to the circuit court of the United States for the district of New Jersey, and it has been no further proceeded in since that time. The third was brought after the removal of the second, and on September 22d, 1877, for the recovery of damages for the like grievances from the date of the second suit, December 30th, 1876. The damages were laid at \$490. The complainants filed the plea of the general issue therein, and notice was given that the cause would be brought on for trial before the Morris circuit court, to be held on the third Tuesday of January,

Lehigh Valley R. R. Co. v. McFarlan.

1878, but further proceedings therein were stayed by the injunction in this cause.

Of the suits brought by the Halseys, the first was begun on the 22d of September, 1876, and the first of those brought by Van Winkle and Hoagland, respectively, were commenced on the same day. All of those three suits were removed into the federal court, and since then have been no further proceeded in. Three other suits, brought by the Halseys, Van Winkle and Hoagland, respectively, were begun on the 22d of September, 1877, for the like grievance (the diversion of the water) as their former suits, but the time of the alleged injury in those cases was from the 22d of September, 1876, and the damages were laid, in each case, at \$490. In those suits the complainants filed a plea of the general issue, and the causes were noticed for trial, but all further proceedings were stayed by the injunction.

The complainants, by their bill, present three reasons specially applicable to the litigation which has been begun by McFarlan, why that litigation should be drawn into equity. The first is that the dam was originally built on land which, theretofore, had belonged to Henry McFarlan, the elder, and which the Morris Canal and Banking Company acquired of him for the purpose of building and maintaining the dam there, and that the dam was originally erected, not only with the consent of Henry McFarlan, Sr., and by his permission and license, but with his aid; they alleging that it was built at the joint expense of him and the canal company. The second is that the defendant, McFarlan, was, from 1829 to 1833, and from 1844 to 1859, excepting the year 1848, a director of the canal company, and while he was director attended the meetings of the board, and resided at Dover, and was fully cognizant of the affairs of the company, the use made by them of the dam and of the flash-boards of which he now complains, and also knew of and participated in the transactions of the company in deepening and widening the canal, and reconstructing the locks and planes thereof to accommodate

Lehigh Valley R. R. Co. v. McFarlan.

boats of a larger size than the canal had theretofore been capable of accommodating; that that work was done at a great expense, and would be useless without the dam and flash-boards to raise the water; that he never, while he was a director, made known to the company that their use of the dam and flash-boards was an infringement on his rights, or that he ever intended to question their right to use them, and that he has for thirty years permitted them to continue the use of the dam and flash-boards at their free will and pleasure, without interruption or hindrance.

As to the litigation by the Halseys and the tenants of their property, a single consideration, as peculiarly applicable thereto, is presented by the bill, and that is that the canal company, after the enlargement of their canal, in 1845, settled with and paid Joseph and John D. Jackson, who were then the owners of the property, or one of them, in full for all damages which might be sustained by them, or either of them, by reason of the supposed decrease of the waters of the Rockaway river at the mills and bloomery, by means of the dam and flash-boards, and received from the Jacksons a grant in fee, in the nature of a perpetual license, to maintain the dam and flash-boards, and that the license or grant has, through lapse of time, been lost; and that the Halseys are the children and heirs at law of a daughter of Joseph Jackson, and hold their present title and claim to the lands under him.

The bill presents another consideration applicable to the litigation of all the defendants, viz.: that the complainants ought in equity to be protected against these numerous suits. The considerations which are presented as peculiarly applicable to the litigation by McFarlan, were both appropriate to the case of the complainants in the suit brought by them against him and others in this court, to restrain him and them from removing the flash-boards, and which has recently, on final hearing, terminated in favor of the defendants. *Lehigh Valley R. R. Co. v. McFarlan*, 3 *Stew.* 180. In that case this court adjudged, on final hearing of the cause, after full

Lehigh Valley R. R. Co. v. McFarlan.

opportunities to the parties to litigate the questions involved in the suit, not only that the complainants had no right to maintain the flash-boards on the dam, but that McFarlan vehemently protested against the use of them as long ago as 1857. The vice-chancellor, before whom the cause was tried, says in his opinion, that the evidence shows conclusively that from 1857 to the commencement of that suit, which was in 1875, McFarlan had constantly disputed the right claimed by the complainants, and had forbidden them to exercise it; that the supervisor, Groff, testified that the boards were frequently, during that period, put on in defiance of McFarlan's protests; that in protesting the latter said, "You have no right to put them on, and the day is coming when you shall not do it;" and the vice-chancellor adds that it is undeniable that the right was exercised in defiance of resistance, so far as resistance could be made by words, and in spite of a threat that, if it was persisted in, resort would be had to more efficacious means of protection. He further says that it was insisted, on the argument, that, independent of any question of legal right, the acts and omissions of McFarlan estopped him from denying the complainant's right; that it was claimed that the proofs showed that he stood by passively for a long time and permitted the canal company to expend large sums of money in deepening the canal and enlarging the boats, under the belief that they had an easement in his lands; and also that he, as a director of the canal company, joined in the execution of the lease from that company to the complainants; but he says that in his view neither fact was established by the evidence, and that he regards it as entirely clear that the canal company were not misled by anything which McFarlan said or did, and that the latter constantly resisted the right which the complainants in that cause asserted, and compelled the canal company to exercise it in strife. It may be added that the verification of the bill in the case under consideration establishes nothing on this subject of equitable estoppel, on the ground that McFarlan was a director when the improve-

Lehigh Valley R. R. Co. v. McFarlan.

ments before referred to were made, except the fact that it appears from the records and minutes of the canal company that he was a director during the time stated in the bill. McFarlan, in his answer, denies that those improvements depend at all for their usefulness upon the use of the flash-boards, and says that he never, until after he ceased to be a director, knew or supposed that the depth of water in the four-mile level east of Dover depended on the height of the dam or the use of the flash-boards, or that flash-boards were used to keep the water up to navigable height. On this point it may be further said that the bill, while it sets up a parol license against McFarlan, makes no offer of compensation. As to the other consideration, referring to the original building of the dam, that relates to the original dam itself, of which no complaint is made, and not to the flash-boards; and, moreover, that consideration is available as a defence at law.

But it is enough to say, in reference to the relief claimed against McFarlan in particular, that the court has already, in a suit brought by the complainants against him in respect to the flash-boards, adjudged that the complainants have no right to maintain those boards on the dam, and the injunction restraining him from removing them has been dissolved. It cannot reasonably be expected that it will now restrain him from pursuing his claim for the recovery, by legal proceedings, of damages for the injury which he may have sustained by the unlawful placing of those boards upon the dam.

The consideration presented as specially applicable to the other defendants, the defence of a grant which is lost, is available at law.

But it is urged that this court will interfere to save the complainants from the trouble, vexation and expense of a multiplicity of suits, and it is, in this connection, suggested that the complainants are operating, for the public benefit, a large and important work, a great line of artificial navigation; and that they should be protected by equity against

Lehigh Valley R. R. Co. v. McFarlan.

unnecessary litigation in respect to the consequences or effects of their works on the property of others. It is urged, also, that the injuries of which McFarlan, on the one hand, and the Halseys and their tenants, on the other, complain, though apparently different, have their origin, if they exist at all, in the same cause, the dam and flash-boards; and that, inasmuch as others owning or possessing lands on the banks of the Rockaway, may make like complaint and bring suit against the complainants at law for the same cause, it is equitable that this court should, itself, determine once for all as to the lawfulness of the structure of the effects of which the complaint is made. But it is by no means clear, to say the least of it, that the cause of complaint is the same in all of the existing suits. It is by no means clear that the diversion of water, of which the Halseys and their tenants complain, is due to the dam and flash-boards. They do not complain of the dam, but allege that the complainants have, by means of their canal, diminished the water supply to which they are by law entitled for their mills and bloomery. McFarlan complains of the flowing which the unlawful height to which the complainants raise the water, by the dam, occasions; but he makes no complaint of diversion. If the flash-boards were removed, and the dam were to stand only at the height which McFarlan regards as lawful, it does not appear that that would prevent the diversion of which the other defendants complain. On the other hand, if the complainants should cease to divert the water and leave the dam at an unlawful height, they would still flow McFarlan's land.

The case is not one where many claim the same right against one, or where one defends the same right against many. The rights are different. If the complainants, in the construction or operation of their works, do injury to persons or property, they must answer for it, as others are compelled to do. If, in so answering for an injury, it appears that they are harassed with unnecessary suits, this court is open for their relief, to protect them against the vexatious

litigation. Now, however, on the one hand, is McFarlan with his suits for his special injury, and, on the other, are the Halseys and their tenants, with theirs, for their particular injury—and that is all. To entitle a party to a bill of peace, it must be clear that there is a right claimed which affects many persons, and that a suitable number of parties in interest are brought before the court; for, if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed, for it cannot then include any persons but the very defendants. *Story's Eq. Juris.* § 857. Said Chancellor Kent, in *Eldridge v. Hill*, 2 *Johns. Ch.* 281: “A bill of peace enjoining litigation at law seems to have been allowed only in one of these two cases: Either where the plaintiff has already satisfactorily established his right at law, or where the persons who controvert it are so numerous as to render an issue, under the direction of this court, indispensable, to embrace all the parties concerned, and to save multiplicity of suits. In the case in *Atkyns* (*Tenham v. Herbert*, 2 *Atk.* 483), Lord Hardwicke refused to interfere between two individuals until the right was first tried at law. In the present case there has been but one trial at law, and that one was declared against the plaintiff. The controversy is between him and a single individual, and is pending for decision in the supreme court. If the defendant Hill continues to harass him with fresh suits at law, it is because a new cause of action (as he alleges) continues to arise daily by the continuation of the nuisance. No case goes so far as to stop these continued suits between two single individuals so long as the alleged cause of action is continued, and there has been no final or satisfactory trial and decision at law upon the merits.” See, also, *Thompson v. Engle*, 3 *Gr. Ch.* 271, 277.

In the case before me, the bill makes no reference to any other person or persons than the defendants, who call, or who will be likely to call, in question the same rights which the defendants contest in the suits at law. See *Willis's Eq. Pl.* 277. For aught that appears in the bill, these defend-

Lehigh Valley R. R. Co. v. McFarlan.

ants are the only persons who have sued, or are likely to sue, the complainants at law. The *gravamen* of the complaint of the bill is, the particular suits therein stated, brought by the defendants. The language of the bill is:

“And your orator shows and charges the truth to be, that the object of the said eight suits at law, now pending against your orator in said supreme court, is, to impeach, controvert and call in question the right of your orator to maintain and use said dam at Dover, which is already in controversy in this court, between your orator and said Henry McFarlan, as hereinabove set forth [referring to the before-mentioned suit for injunction, recently decided], and that your orator, in defending said several suits in a court of law, will be required to maintain and establish the same right in each of said eight cases, and that thereby your orator will be subjected to great and useless expense, and that, to prevent said useless and vexatious litigation and such a multiplicity of suits, your orator is entitled to the intervention and aid of this honorable court.”

It appears, from the bill, that the fact that there are eight suits at law, instead of four only (one by McFarlan, one by the Halseys, and one by each of their two tenants), is due to the fact that the complainants, in the exercise of what they claim to be their right, removed four of the suits at law into the federal court. Perhaps, if that removal had not taken place, the four would have been the only suits brought until the questions raised therein should have been determined at law. That they have not been pursued, is probably owing to the fact that they were removed. One set of the suits may perhaps be regarded as mere skirmishing for position. But, however that may be, the suits of each party were brought for damages for different periods of time.

This court would (it should be added), on application of the complainants, protect them against being required to defend themselves on the same claim of right in all the suits brought by each party, and would direct that one of the suits brought by McFarlan, the Halseys and Van Winkle and Hoagland, respectively, be brought to trial, and that the other suits, brought by the same parties for the

Lehigh Valley R. R. Co. v. Society &c.

like injury, from the same cause, stand until the result of that one is known.

The injunction must be dissolved. From what has been already said, it follows that the bill has no equity, and is, besides, multifarious.

The demurrer will be allowed.

THE LEHIGH VALLEY RAILROAD COMPANY

v.

THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES.

Equity has jurisdiction (and for that purpose may enjoin the further prosecution of suits at law) in a case which involves the relative rights, under their charters, of two corporations to the use of the waters of the same stream or streams; and such jurisdiction exists on the ground of both public and private necessity. In such cases, equity is not only the appropriate forum, but the only one where adequate relief in the premises can be administered.

Bill for relief. On motion to dissolve injunction, on bill, answer and affidavits annexed to each.

NOTE.—The reporter is indebted to the courtesy of *H. C. Pitney, esq.*, for a pamphlet copy of the following opinion of *Chancellor Isaac H. Williamson*, which completes to the present time the legal history of this celebrated case. No apology for its insertion here is deemed necessary, since it has become so scarce as to be virtually inaccessible to the profession and public:

IN CHANCERY, NEW JERSEY.

<i>Between the Society for Establishing Useful Manu- factures and others, complainants, and The Morris Canal and Banking Company, defend- ants.</i>	} On Bill for Injunction.
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This bill was filed by the complainants for the purpose of establishing their right to all the water of the Passaic river at Paterson, and to restrain the defendants and their agents from diverting, in anywise,

Lehigh Valley R. R. Co. v. Society &c.

Mr. H. C. Pitney and Mr. J. D. Bedle, for the motion.

Mr. T. N. McCarter, Mr. A. B. Woodruff and Mr. F. T. Frelinghuysen, contra.

THE CHANCELLOR.

The complainants, the Lehigh Valley Railroad Company, are, under lease from the Morris Canal and Banking Company, the proprietors of a line of canal, of about one hundred miles in length, from the Delaware to the Hudson. The defendants, the Society for Establishing Useful Manufactures, were incorporated in 1791. The charter of the canal company was granted in 1824. At and prior to the latter date, the society claimed to be entitled, as riparian owners, to all the waters of the Passaic river at the great falls at Paterson, and they then, as they have ever since, derived revenue from the rents received for the use of the water as

any of the waters of the said river, or of the streams of water tributary thereto, and leading to the same, from the bed of the said river, so as to prevent the same, or any part thereof, from flowing along that part of the bed of said river where the said waters are carried off therefrom by "The Society for Establishing Useful Manufactures," at Paterson, for the purpose of supplying manufacturing establishments at that place.

The cause was argued at Trenton, at the term of January last past, by G. Wood and Ph. Dickerson, esqs., of counsel with complainants, and D. B. Ogden and Jos. C. Hornblower, esqs., of counsel with defendants, and at the term of April last past the following opinion was delivered by *His Excellency Isaac H. Williamson, esq.*, chancellor.

When this motion for an injunction was first made, I was struck with the importance of the case itself, as I perceived it involved questions of great magnitude, affecting the vital interests of the parties, and of great public concern, and I therefore thought it right, not to act on the *ex parte* application of the complainants, but to direct notice to be given of the motion—and, in the hope that I might obtain the assistance of the chief justice, which would have been very gratifying to me, the motion was directed to be made at this place, on the first day of the then next regular term of this court; and I cannot but regret, as well on my own account as that of the parties, that I have been disappointed in that hope. But I feel it a matter of great satisfaction that the merits of the motion have been so fully and ably argued as very much to have lessened, in my mind, the difficulties of the case.

"The Society for Establishing Useful Manufactures" was incorporated in 1791. The object of the legislature, in granting the charter, is

Lehigh Valley R. R. Co. v. Society &c.

a motive power to the factories in Paterson. Up to 1836, when an agreement was made between the canal company and the society in regard to the water, the latter claimed the right to use all the water of the Passaic at the great falls, without diminution or alteration. The canal company appear from the beginning to have insisted on the right to use the water for their purposes to the extent to which they have used it, and, alleging that they supplied the place of all they used, with other water from their sources of supply (and even supplied more), so that the quantity of water at the falls at Paterson was, in fact, undiminished, insisted that the society had no cause for complaint. The society, in 1829, before the works of the canal company were completed, apprehending that those works would, when in operation, injuriously affect their supply, filed their bill in this court against the canal company, for an injunction to restrain the latter from diminishing it. The injunction

clearly expressed on the face of it; it was "for the purpose of establishing a company for carrying on the business of manufactures in this state." At this time our national government was but in its infancy; few articles of any description were manufactured in the United States, and we were dependent almost entirely upon foreign nations for articles of the first necessity; the consequences of which were sensibly felt and deeply deplored. It was under such circumstances that some individuals conceived the laudable and patriotic design of combining and employing a large capital, by means of an act of incorporation, in the hazardous and untried experiment of manufacturing useful articles for domestic consumption; and, under the flattering auspices of one of the first and most distinguished men of that day (Alexander Hamilton), and to whose memory this country owes an everlasting debt of gratitude for his invaluable public services, the association was founded and the charter granted.

The plan contemplated was every way worthy of its early patrons. It was one of no common magnitude. It was not to establish a company for the mere purpose of manufacturing some particular description of goods; but it was to lay the foundation of a *great emporium of manufactures*, for all such commodities or articles as should not be prohibited by law. To effect this grand and interesting object, to encourage a spirit of enterprise, and command the capital necessary for the purpose, the most extensive privileges were granted. The charter was in perpetuity; the original capital limited at one million of dollars, with liberty to acquire and hold real and personal property to an amount in value not exceeding four millions of dollars; the seat of the intended establishment was not fixed by the legislature, but the society

Lehigh Valley R. R. Co. v. Society &c.

was refused, on the ground that they had sustained no actual injury, and that the canal company protested that their works not only would not diminish the supply, but, on the contrary, would increase it. *Opinion of Chancellor I. H. Williamson.* [See note.]

In 1830, they filed another bill, alleging that a considerable part of the canal company's works had been completed, and that experiment had satisfied them that the effect of the operation of those works would be injurious to them in diminishing their supply, and also by commingling other water with that of the Passaic and its tributaries. The injunction applied for on this bill was also denied. It was refused by Chancellor Vroom, on the ground that, as to the commingling of the water, it did not appear that the foreign water was not as good as that of the Passaic, and as to the diversion, the canal company disclaimed any intention to diminish the supply, but presumed that the effect of their

were left free to locate it in any part of the state; and provision was made for incorporating the district, not exceeding six miles square, by the name and title of "the corporation of the town of Paterson."

It was manifestly the expectation of the legislature who granted the charter, that the society would themselves carry on the business of manufacturers, and that a part of their large capital would be employed for that purpose. It was their capital, their example and exertions, which were looked to, to lay the foundation of the contemplated manufacturing town, by diffusing a general spirit of enterprise and active industry, and by drawing around them a great manufacturing population. By the second section, their original capital is "to be employed in manufacturing or making all such commodities or articles as shall not be prohibited by law, and, to that end, in purchasing such lands, tenements and hereditaments, and erecting thereupon such buildings, and digging and establishing such canals, and doing such other matters and things as shall be needful for carrying on a manufactory or manufactories of the said commodities or articles."

Soon after the passing of the charter, the society was organized, and in 1792 a situation at the great falls of the Passaic river was made choice of "as a suitable place for the principal seat of their said manufactures." They purchased the old mill seat and upwards of seven hundred acres of land, with the bed of the river both above and below the falls. They expended large sums of money to create a great water-power to carry on their manufacturing operations with. They constructed a canal or water-course, a short distance above the falls, to lead the waters of the Passaic river through the lands of the society and return them again into the bed of the river. They also threw a

Lehigh Valley R. R. Co. v. Society &c.

works would rather be to increase it. *Society &c. v. Morris Canal &c. Co., Sax.* 157.

In 1836, the canal company was before the legislature seeking authority to conduct into their canal the waters of Long pond or other waters that might be necessary for the supply of their canal, and for that purpose to construct a navigable feeder and take tolls thereon. The society appeared in opposition, but withdrew their objection upon the making of an agreement between them and the canal company, by which it was provided that they should have a certain amount (three square feet) of water from the canal, to be discharged at a place therein designated, and the canal company were to be at liberty to divert all the streams tributary to the Passaic, and to use the waters of those streams as they might think proper. The supplement was passed.

In 1845, a bill was filed in this court by the canal company to restrain the society from tearing down a permanent

dam across the river and formed a sluice or race-way, by which the water was carried into a large basin or reservoir, from which it was to be carried into the canal which they had constructed, and such others as they should construct, for multiplying sites for manufacturing establishments; and they thus appropriated, by occupancy, the waters of the Passaic to the purposes of the institution.

In 1793, the society erected buildings and established a cotton factory, and, in 1794, they established a printing, bleaching and dye-shop. They employed a number of manufacturers and other hands, and carried on the business of manufactures for some years; but, such was then the situation of the country, and so many were the difficulties which the society had to encounter, that this institution, with its large capital and extensive privileges, was unable to support itself; and the directors, after sinking a great part of their capital stock, found it necessary to discharge their numerous hands—to sell off their raw materials and other personal property—and entirely to discontinue the business of manufactures; and they have not since resumed it; nor is any part of their capital employed or used in manufacturing business. They never abandoned their water-works or other improvements which they had constructed; and, in 1807, they constructed a second canal or water-course, and, in 1827, a third; and the grounds around and adjacent to those canals, now form numerous valuable sites for mills and factories.

Many of the members having become discouraged by the misfortunes and losses of the society, sold out, and in 1814, Mr. Colt, the present enterprising governor of the society, purchased up, at a depreciated price, a large proportion of the shares, called the directors together,

Lehigh Valley R. R. Co. v. Society &c.

wall, which the former had built in place of the gates, through which, after the agreement of 1836, the three square feet of water had been furnished to the society. A preliminary injunction was granted. The society answered the bill and filed a cross-bill for specific performance of the agreement. In their bill the canal company stated that to furnish the three feet of water, according to the agreement, would create a current which would destroy the usefulness of their canal; and they also insisted that the agreement was not binding on them because it was made subsequently to the giving of what is known as the Dutch mortgage on the property and franchises of the canal company, under foreclosure of which mortgage and a new organization of the company the then complainants claimed title, free, as they insisted, from the obligation of the agreement. Motion was made to dissolve the injunction granted to the canal company and for an injunction on the cross-bill. The chan-

and resumed the operations of the society; but their operations since that period have been principally confined to the construction of works to increase their water-power, and the number of sites for manufacturing establishments; and, instead of carrying on manufactures themselves, they have leased out to individuals and companies, upon rent, sites with water privileges, for manufacturing establishments. Under that management, the business of the place has flourished, and so far has the society fulfilled the expectations of the legislature, that Pater-son has become decidedly the greatest manufacturing town in the state, and one of the largest in population and active industry: the town is supported, and has risen to its present importance, entirely by manufactures and the various trades growing out of them, and the inhabitants have become incorporated under the provisions of the charter to the society. From the present flourishing condition and rapid increase of the population, industry and wealth of the district, the state is realizing all the important benefits and consequences which were fondly anticipated by the first patrons of the institution.

In 1824, "The Morris Canal and Banking Company" was incorporated; and, most unfortunately, conflicting claims are set up by the respective corporations to the use of the waters of the Passaic river and its tributary streams, which have given rise to the present suit.

The Morris Canal and Banking Company was incorporated "for the purpose of constructing a navigable canal to connect the waters of the Delaware river, near Easton, with the tide-waters of the Passaic river, and passing through the county of Morris," and, in July, 1825, the company commenced the excavation of their canal, which, ever since that time, has been in continual progress; but that part of it which

Lehigh Valley R. R. Co. v. Society &c.

cellor (Halsted) denied both motions. *Morris Canal &c. Co. v. Society &c.*, 1 *Hal. Ch.* 203.

In 1846, the society brought, in the Passaic circuit court, an action of ejectment against the canal company to recover possession of a lot of land said to include the premises on which the wall before mentioned was erected. The suit was based on the ground that the company had no title to the land, that no agreement had been made by them therefor with the proprietors of the land (the society), and that there had been no legal assessment and payment of damages for it. It was decided in 1854. The result was adverse to the society, the court holding that the original charter of the canal company, under which the lands were taken, gave them the right to enter upon and take lands required for their work without first making compensation, that the enactment was constitutional, and that, although no compensation or assessment was ever made, the owner of the

approaches nearest to the town of Paterson, was not finally located till the year 1826. A great part of the excavation along the line of the canal is now accomplished, and the whole work is in a great state of forwardness. The defendants have expended, in this great and arduous undertaking, upwards of \$828,000, and they say, in their answer, that the sum of \$287,514 will be sufficient to complete the canal, and to pay all outstanding balances to contractors and workmen of every description.

Under these circumstances, and after such an immense expenditure of money in a great and laudable undertaking which does honor to the state and promises much public utility and benefit, it is seriously to be lamented that this controversy should have arisen between the two corporations; and the greatest caution is necessary before this court should interfere, in the summary but powerful way of an injunction, to suspend the progress of the defendants in the completion of their canal; or take any step which may have a tendency to excite serious doubts or alarm in the public mind as to those rights of the respective companies which are essentially necessary to their prosperity and success.

Some of the questions raised on the argument strike at the vital interests of the respective corporations, and even at their legal existence. It is contended, on the part of the defendants, that the incorporation of the Society for Establishing Useful Manufactures is actually dissolved, and that the society, as a corporation, is extinct, so far as it respects all legal rights and powers. If this objection is well founded, it is clear that the society is assuming a character which does not belong to it, and, if so, that it is not entitled to the relief which,

Lehigh Valley R. R. Co. v. Society &c.

lands could not bring ejectment for them. *Den v. Morris Canal &c. Co.*, 4 Zab. 587.

The object of this suit probably was to compel a recognition of the obligations of the agreement of 1836.

In 1847, the society brought an action for damages against the canal company for the erection of the wall and so diverting the waters of the streams or water-courses from the canals of the society, and preventing them from flowing to those canals as of right, as they alleged, they ought to have flowed. To the declaration in that suit the company interposed a demurrer, and the cause appears to have proceeded no further.

In December, 1853, the society brought another action, in the supreme court, against the canal company, for damages for diversion of the water. In this suit the canal company pleaded the plea of the general issue, and the suit was no further proceeded in.

as possessing that character, the society might otherwise be entitled to.

It is not pretended that the society was not duly incorporated and organized; but the objection is, that the corporation has, by subsequent events, become dissolved; and the facts from which a dissolution is inferred are said to be, that they have discontinued and ceased, for now upwards of thirty years past, to carry on the business of manufactures; that they have actually relinquished and abandoned all intention of resuming or carrying them on in future, and that they have perverted the institution from its original design, by confining their operations to creating water-power and leasing out sites and water privileges for manufacturing establishments, instead of employing a part of their capital in establishing and carrying on the business of manufactures. And it is contended that a corporation is always created upon a trust, and that, if that trust be broken, the charter is forfeited; that here the trust was, that they should establish and carry on the business of manufactures.

But a corporation may exist without exercising its corporate rights; and the mere omission of a corporation to exercise some of its rights and powers is no cause of forfeiture of its charter, much less will such an omission work a dissolution of the corporation. Even a corporation, being disabled to act by a judgment of ouster against the persons claiming in fact to be the mayor and aldermen, has been held not to be dissolved, but dormant, and their former rights remain. 3 Burr. 1866.

Their not carrying on the business of manufactures is a mere neglect or omission to exercise a corporate right, and is no more than a *non-user* of that privilege; and, by the 37th section of the charter, it is expressly

Lehigh Valley R. R. Co. v. Society &c.

From that time to September, 1876, no action was brought in any court by either party in respect to the subject of controversy. At that date a suit was brought (the action being on the case) in the supreme court, by the society, against the complainants in this suit, for damages (laid at \$50,000) for diverting the water, from April 1st, 1872, to the commencement of the suit, and carrying it away and disposing of it to their own use, and so hindering its flow in the natural channel to the works of the society. The complainants pleaded to the merits, and an order for a struck jury was obtained by them, and they, then being a corporation located in another state, removed the suit by petition to the circuit court of the United States. The suit was not pursued in that court, and in September, 1877, the society brought another action on the case in the supreme court, against the complainants, for like injury from, and only from, the time of commencing the suit in 1876, a period of one year. The

provided, that the charter shall be construed in the most favorable manner for the society, and that any *non-user* of the privileges thereby granted shall not create any forfeiture. The legislature itself, therefore, contemplated the happening of such a state of things as might make it advisable for the society not to exercise all their rights and powers, and their relinquishing or abandoning for the present the carrying on the business of manufactures, is a mere *non-user* of that privilege, and they may, whenever circumstances shall make it their interest to do so, again resume it. This society was not intended to be a mere temporary institution, but a permanent one, and of general interest, and it was necessary, therefore, that after manufactures were introduced and established, and a large population had become deeply interested in the continuance of the society and of course in the continuance of all its chartered rights, that no *non-user* by the society should create a forfeiture of its charter.

Nor has the society, in my opinion, by employing their funds in improving the natural advantages of the district, by increasing their water-power and multiplying seats for manufacturing establishments, and granting leases for manufacturing purposes to individuals and private companies, either abused their corporate powers or perverted the institution from its original design. A right to improve their estate and to sell, lease or otherwise dispose of their property, is incident to all corporations, unless restrained by the provisions of their charter, and the society, as the proprietors of the lands, had a clear right, without the grant of an express power for the purpose, to have done all those things. But the legislature has expressly granted to the society not only a capacity to *acquire and hold lands*, but to sell, grant, demise, alien

Lehigh Valley R. R. Co. v. Society &c.

damages therein (to avoid a removal of the suit to the federal court) were laid at \$490. The complainants pleaded the general issue therein and applied for a rule for a struck jury, which was granted, and the cause was noticed for trial before the Passaic circuit court, the trial to take place on the 8th of January, 1878. The further progress of that suit was stayed by the injunction in this cause.

The complainants, by their bill, pray that they may be protected by the decree of this court in the use and enjoyment in their canal of the waters of the Rockaway, Pompton and Pequannock rivers and the other tributaries of the Passaic, in the same manner and to the same extent as the canal company before the lease, and as they have since then (as they allege) enjoyed them; such enjoyment by the complainants and their lessors having, as they say, continued without interruption for more than thirty years; that the society may be enjoined from setting up or asserting any

and dispose of them; and without a power to improve and sell or lease, I would ask, what would have been the condition of the town of Paterson, in comparison with its present condition? Where its 8,000 souls—its cotton and iron business, and its various other branches of manufactures now successfully carried on there? Without those rights and powers all the natural advantages of the place—this important stream of water, capable of supplying numerous manufactories, and thereby furnishing employment for many thousands of men, women and children, must have been held by the society, a monopoly of privileges and advantages, without a capacity to use them, or power to permit others to do it. The society has, by the exercise of this power and the judicious management of its funds, actually introduced and established manufactures—excited numerous individuals to enterprise and industry—drawn into the district capital and manufacturers, and built up a large flourishing town, and thereby greatly added to the wealth and population of New Jersey, and elevated her character in the Union as a manufacturing state. And I have not any doubt that the population, active industry and wealth of the district have been much better promoted, and the interest of the state infinitely more advanced, by the employment of the funds of the society in increasing their water-power, creating advantageous sites for factories, and otherwise improving the great natural advantages of the place, than if the society had employed its capital in erecting buildings, digging and establishing navigable canals, and carrying on, themselves, the business of manufactures. And I cannot consider the employment of their capital in the way in which it is employed either an abuse of power or a perversion of the end of the institution.

Lehigh Valley R. R. Co. v. Society &c.

claim to the water against the complainants by reason of the matters alleged in the bill, and that they may be restrained from prosecuting the suits at law, and they pray relief generally. By the bill, they insist that the right of the canal company to the use of the waters of the Rockaway, Pompton and Pequannock rivers, as it existed when the suits in this court, particularly that of 1845, were brought and prosecuted, has become settled and established by the charter of the canal company; by grant and prescription; by long submission by the society to the decisions of this court; by their long acquiescence since the decision of the suit of 1845, and their not having, for more than twenty years, prosecuted the undetermined actions at law against the canal company; and that the society ought, in equity, to be prevented from calling the right in question and from re-asserting the claims which the complainants insist were so long ago determined against them, and which, the complainants allege, were so

But if the society has forfeited its charter by an abuse of power, or by a perversion of the design of the institution, or by the breach of any implied trust or contract, or in any other way, this court has no jurisdiction to try the question of forfeiture, or to examine into and decide on it in this collateral way. A forfeiture does not, *ipso facto*, occasion the civil death or dissolution of the corporation. It does not thereby become extinct and incapable of asserting or defending its rights, but continues an existing corporate body, both in law and fact, until dissolved by some legal proceeding, and in no case of a forfeiture is a corporation dissolved without a judgment in a court of law, at the suit of the state to enforce the forfeiture.

If, therefore, the society has incurred a forfeiture of its charter, and the state does not elect to take advantage of it, the defendants cannot, and the distinction attempted to be made between the case of a corporation coming to assert a claim of right and that of a corporation claiming, as defendants, a mere exemption from liability, is fallacious and unsound, when applied here.

Nor is there any foundation for the argument that the society has done acts equivalent to a surrender of its charter. A corporation may, undoubtedly, surrender its charter into the hands of the government from which it was received: but then the government must give its assent to such surrender. But there is no proof whatever that any such surrender has ever been offered. The minutes of the society only prove that the directors once called the stockholders together, to take into consideration the expediency of dissolving the society, but there is no evidence that the stockholders ever agreed to such a proposition. And there is not, in my opinion, the least ground for the pretence that

Lehigh Valley R. R. Co. v. Society &c.

long ago abandoned by them; that the supplement of 1836 to the canal company's charter, was an important addition to their franchises, the exercise and enjoyment of which necessarily required the use of the waters of the tributaries of the Passaic; and that it was passed not only with the consent, but with the active aid of the society; and that the expenditure consequent thereon in the construction of the works of the canal company to avail themselves thereof, was incurred with the knowledge, and the works constructed with the consent of the society; that that supplement contained no restrictions on the use of the franchises thereby granted; that the complainants relied on the supplement, and the large works constructed by the canal company, for the enjoyment of the privileges thereby granted, when they took their lease in 1871, and incurred the heavy obligations which they then took upon themselves in consideration of the lease; that if the society be now permitted to assert and

the society, as a corporate body, is dissolved, or has no legal capacity to assert and maintain its rights.

But the complainants have retorted this objection on the defendants and deny that they are a legal existing corporation. This I consider a very singular objection to come from the complainants, when the bill is against the defendants in a corporate capacity, and for acts done by them in that capacity, and not against defendants in their individual characters, for if they are a corporation for the purpose of being made defendants, surely they must be a corporation for the purpose of defending their acts.

Upon this bill, if the court makes an order for an injunction, it must be against the Morris Canal and Banking Company; but if there is no such corporation, who will be bound by the injunction, or who can be punished for a breach of it? A bill for relief against defendants in a corporate capacity, and at the same time charging that they have no corporate capacity, is a *felo de se*.

But there does not appear to be any solid foundation for the objection, if it could be raised on these pleadings. The answer, which is sworn to by the president of the company, expressly states that ten thousand shares were subscribed for, and ten dollars paid on each share to the commissioners; that an election of directors was duly advertised and directors elected, and that the commissioners paid over to them the subscription money. If these facts are true, and there is no reason to doubt it, the corporation was legally organized and came regularly into existence. It is true, the answer further states; that in 1827, and after the second election of directors, shareholders to the amount of six thousand shares came before the board of directors, and alleged

Lehigh Valley R. R. Co. v. Society &c.

enforce their claims, it will destroy the canal; that the same matters involved in the existing suits at law were submitted to this court in 1845, and if the society desire to litigate them, they should do so in that suit, by supplemental bill; that the conduct of the society in bringing successive suits which were not prosecuted to final determination, but abandoned, is oppressive; and that the society have, for various reasons in the bill mentioned, no right against the complainants, under the agreement of 1836.

The society answered. There were affidavits annexed to both bill and answer. On the hearing, some were presented on the part of the complainants, to which objection was made by the defendants, and they were read subject to the objection. In reaching my conclusion I have not referred to nor read them. The defendants insist that there was no adjudication in any of the suits brought by them against the canal company adverse to their claim, whether as origi-

that they subscribed for the company and not for themselves; that the directors denied that; but it appearing to them that the shares were subscribed by irresponsible persons, they took back the six thousand shares.

There may have been, and probably was, very incorrect conduct in the commissioners, or in the board of directors, or in both; but I do not see that it proves that the corporation has not been legally organized, or that it has not now all its corporate rights and powers. The commissioners could not have authorized any persons to subscribe for the company, for the corporation was not then in existence; and if the directors have done an improper act in returning the subscription money on the six thousand shares, they may, in doing so, have committed a very improper act, and have been guilty of a breach of trust; but such breach of trust cannot operate a dissolution of the corporation.

These preliminary objections being removed out of the way, I proceed to consider the rights of the respective parties to the use of the waters in question, or so far as is necessary in order to dispose of the present application.

The river Passaic, at the great falls, is a private and not a public river. The great falls are several miles above tide-waters, and the river is not navigable there, nor has it ever been used for the purpose of navigation, and it was not made a question upon the argument but what the river, at the place where the society is carrying on their operations, is capable of being held, and is now held and enjoyed by the society, as private property. And, as owners of the lands, the society has a clear and undoubted right, in my opinion, to the flow of all the waters

Lehigh Valley R. R. Co. v. Society &c.

nally made, or as insisted upon under the agreement. It appears, however, that they did not prosecute to final decision any of the suits, except the action of ejectment. In his decision in the suit of 1845, Chancellor Halsted expressly left them to their remedy at law. They appear to have subsequently brought two suits for damages against the canal company, in respect to the use of the water, but did not prosecute either one to judgment. Whether their conduct, in bringing those fruitless suits, renders the present litigation liable to be regarded as vexatious, I do not consider it important now to determine. There are other considerations which, in my judgment, are conclusive of the question now before me. From 1853 to 1872, nineteen years, no action was brought by the society against the canal company in respect to the water, and it may be assumed that during that period there was no cause of complaint. Mr. E. Boudinot Colt, governor of the society, says,

of the Passaic, at the great falls, in their ancient channel, without *diminution or alteration*.

Every owner of lands has a right to the use of the waters flowing through them, and may, by occupancy, appropriate the waters to his own use, if in doing so he does not injure some other proprietor. Judge Blackstone says (2 *Bl. Com.* 403): "Thus, too, the benefits of the elements, the light, the air and the water, can only be appropriated by occupancy. If a stream be unoccupied, I may erect a mill thereon and detain the waters, yet not so as to injure my neighbor's prior mill, or his meadow, for he hath, by the first occupancy, acquired a property in the current. This doctrine is fully supported by *Cox v. Matthews*, 1 *Vent.* 237.

So in *Brown v. Best*, 6 *Wils. Ch.* 172, which was a special action upon the case for diverting a water-course, it was held by the court that the defendant in whose grounds the water took its rise might cleanse his pits, keeping them as they were, but could not enlarge them so as to *diminish the quantity of water*.

In *Beasley v. Shaw*, 6 *East* 208, it was held that every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration; but that an adverse right may exist, founded on the occupancy of another; that twenty years' exclusive enjoyment of water, in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or an act of parliament. And in *Wright v. Howard*, 1 *Sim. & St.* 203, the principle is distinctly laid down by the vice-chancellor that "every proprietor has an equal right to use the waters which flow in the stream, and consequently no possessor can have a right to diminish the quantity of water, or to

Lehigh Valley R. R. Co. v. Society &c.

in his affidavit appended to the answer, that from 1864 to 1872 he neither heard of nor observed any scarcity of water for the society's lessees, although the amount let out was much increased, and during a portion of that time business was very brisk, and the mills were driven at their full capacity. Romulus Vreeland, in his affidavit annexed to the answer, says that from 1864 to 1873 the mills, driven by the power furnished by the society, were run on full time, and used water freely, and he says he recollects that during those years, and up to 1872 or 1873, there was no noticeable scarcity of water; that in 1872 he noticed, in a dry season, that there was a "sudden shortening" of the water, which lasted about two weeks. John Ramage, in his affidavit, also annexed to the answer, says that from 1865 to 1874 he recollects no shortness of water, except two or three days in 1866, and in 1874. It would seem, then, that up to 1872, at least, the society had no cause of complaint against

use it to the prejudice of any other proprietor, nor to throw the water back on the proprietor above, or to divert it from the proprietor below without a grant, or twenty years' enjoyment, which is evidence of a grant. But no action will lie, except by a person who sustains *an actual injury*." This is the sound and rational doctrine which is supported by all the cases in the English books. Every proprietor has an equal right to the use of the water of a stream or river, and no one has a right to use it, different from what he has before used it, to the prejudice of any other proprietor. The first proprietor, therefore, who erects a mill and dam does not thereby acquire a right to use the water to the prejudice of his neighbor's meadow, for so far his neighbor is the first occupant; but he may detain the water and use it if his neighbor's meadow sustains *no actual injury thereby*, for no action will lie except by a person who sustains *an actual injury*. The right which the proprietor who first erects his mill and dam acquires by occupancy, is only a right not to have his mill prejudiced by the use of the water by any subsequent mill or for some subsequent purpose; for, as against such subsequent mill, or such subsequent use of the water, he is the first occupant, and his neighbor has only a right to the use of the water as he before used it, unless he can so use it as not to prejudice his neighbor's prior mill. Every proprietor, therefore, who claims a right, either to throw the water back upon the lands of his neighbor above, or to diminish the quantity of water which has usually descended to the proprietor below, must prove either a grant or license from such proprietor, or twenty years' uninterrupted enjoyment.

In *Platt v. Johnson & Root*, 15 Johns. 213, it was held by the supreme court of the state of New York that a person erecting a mill and dam

Lehigh Valley R. R. Co. v. Society &c.

the canal company, in respect to diminution of the flow of water, and that for nearly twenty years, from 1853 to 1872, the society and the canal company made use of the water, without any cause of complaint on the part of the former against the latter. The complainants, however, it should be remarked, insist that the state of the water from 1864 to 1872, is no test of the society's right, but that the criterion is its state in 1836. According to the answer, about 1864 the society increased the height of their dam across the Passaic, three feet, and by that means erected a large reservoir, capable of containing nearly seven million cubic feet of water, and the result was such an increase of their power at Paterson as substantially to double it. The complainants insist that this increased amount of water at Paterson came, not from the raising of the dam, but from their stores of water provided for their canal, and that they ought, in equity, to be protected against being held liable, at law, for

upon a stream of water, does not, by the mere prior occupancy, unaccompanied with such a length of time as that a grant may be presumed, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is in part diverted, and he is in some degree injured. This decision does not appear to me to be in accordance with the English decisions. But in that case there was no claim of right set up by the defendant to divert the natural course of the stream, and the mill erected by the defendant was only in its consequences injurious, in some degree, to the plaintiff's mill.

In the present case the society has appropriated, by occupancy, the whole water of the Passaic river, for manufacturing purposes, as they had a right to do under their charter, and the Morris Canal and Banking Company set up no adverse right, founded on any previous grant, or on the occupation of themselves, or any other under whom they claim, and the society has been in the peaceable enjoyment of the waters for upwards of twenty years.

I consider it, therefore, as clear, that the society has a right, as riparian owners, to the flow of the whole of the waters of the Passaic river, in their ancient channel, down to the great falls; and the Morris Canal and Banking Company cannot divert the waters of the Rockaway, by which the waters of the Passaic at the great falls will be diminished, without encroaching on the rights of the society.

Then the next question is, whether the Morris Canal and Banking Company has a right, under or by virtue of their charter, to divert the waters of the Passaic river, making just compensation to the society

Lehigh Valley R. R. Co. v. Society &c.

damages for not continuing to contribute to the society that to which, they allege, the latter were never entitled, and to which, they say, neither the complainants nor their lessees ever undertook, or were under any obligation, to contribute.

But the question, whether the state of the water in 1872 is properly to be regarded as a criterion or not, is not important to the present consideration; for, whether it be or not, it appears that, up to that year, the two parties were able to use the water together, without prejudice to the interests of the society..

The interests, public as well as private, dependent upon the use by the complainants of the water, are very great, and it is manifest that both parties may make use of the water without prejudice to the rights of either. It is the duty of a court of equity, and it alone is competent to the work, to regulate the use of water among those who are entitled to the use of it in common, in such manner as to preserve the

for any actual injury which they shall sustain, and this is a question of the greatest moment to the society.

The defendants contend that the charter of the society does not confer any right or power to enter upon, use or enjoy any streams of water or water privileges for manufacturing purposes, without the voluntary consent of the previous owners thereof, and that the society are left to acquire such streams of water and water privileges, and, when acquired, to hold and enjoy them according to the terms of their contracts with such previous owners, under the ordinary protection of law, and with no special immunities whatever. And the defendants claim to have a constitutional and legal right to take and use the waters of the Passaic river and tributary streams for the necessary purposes of their canal, upon making compensation.

Certainly, the charter of the society does not confer on it any right to appropriate to its own use, without the owner's previous consent, any stream of water, or water privileges, for manufacturing purposes. The legislature itself cannot take private property for public purposes, without just compensation; and it never has been pretended, that I have heard, that the society has a right to take either lands or water for the purposes of manufactures, without the consent of the owners thereof. *But the legislature has granted to the society a capacity and right to acquire, and, when acquired, to hold, possess and enjoy, such streams of water and water privileges as are necessary to carry into effect the objects of their charter.* The society is a civil corporation for private purposes, though, at the same time, deemed to be connected with the public good; and the society could not, therefore, have expected, nor could the legislature have intended to grant them, a right to take private property for

Lehigh Valley R. R. Co. v. Society &c.

rights of each. *Belknap v. Trimble*, 3 *Paige* 577; *Ballou v. Inhabitants of Hopkinton*, 4 *Gray* 324. Said the court in the latter case: "In regulating the rights of mill-owners and others in the use of a stream wherein numbers of persons are interested, equity is able by one decree to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn by all parties, respectively; and this is peculiarly adapted to the relief sought against nuisance and disturbance, and affords a more complete and adequate remedy than can be afforded by one or many suits at law." The language of the same court, in *Boston Water Power Co. v. Boston & Worcester R. R. Corp.*, 16 *Pick.* 512, 526, is precisely in point: "Without going at large into the authorities, the court are of opinion that this is a case where the rights of the plaintiffs being fixed and settled by the statutes, where both parties are corporations claiming certain

manufacturing purposes, without the previous consent of the owners. But as the navigable canals contemplated by the charter were to be, like turnpike roads, common highways for the public to use, paying reasonable tolls, a right and power is given to take lands and water for that purpose, without the previous consent of the owners, on making compensation as provided for in the charter. But when the title is once acquired, what difference does it make, as to the rights of the society to hold and enjoy the property, whether the society acquire their title by purchase, with the voluntary consent of the former owners, or by the compulsory mode mentioned in the defendant's charter? I can discover none, nor do I believe that there is any, in reason and common sense. And when the society acquired a title to the lands, they acquired a right to appropriate and use the waters for manufacturing purposes, without any special grant in their charter of a right to do so. And a right to hold and enjoy is an immunity expressly granted to them.

The argument of the defendants amounts to this: that the legislature has granted to the society a privilege and power to acquire all the rights of property necessary for carrying on manufactures; but that the legislature has granted the society no protection or security for a continuance of the enjoyment of such property; and that, therefore, the legislature was at liberty to grant to another corporation a right to take it away, for other purposes, on making compensation to the society; and which power the legislature has exercised. And the defendants boldly contend for an unlimited right to take the whole waters of the Passaic, if necessary, for the purpose of their canal; and, if their argument be well founded, the Morris Canal and

Lehigh Valley R. R. Co. v. Society &c.

rights, but claiming them as granted by the public, and to be exercised and carried into effect for the use and benefit of the public, it is fit that the plaintiffs, instead of being left to a suit at law, in which relief in damages only could be obtained, should be entitled to the more adequate and complete remedy furnished by a court of equity, where the relative rights of the parties, with their just limits and qualifications, may be declared and fixed, and under which the parties may enjoy, specifically, the very rights, immunities and franchises which the public intended to grant to them, respectively, with an ultimate view to the public benefit and accommodation. A suit at law would only enable the plaintiff corporation to recover and distribute a sum of money, by way of damages for the violation of those rights, among the members of that corporation, as individuals, but would not empower them to accomplish the specific public objects for attaining which these franchises were conferred on them."

Banking Company has the right to take the waters of the Passaic, in the first instance, without having recourse to the waters of the Hopatcong lake at all.

But can this be possible? Can it be, that the legislature intended, and the society so understood it, that after hundreds of thousands of dollars had been expended in a hazardous but important undertaking; and that after the object had been accomplished, and a large and populous manufacturing town had grown up, the whole water-power of the society, on which their prosperity, and the prosperity of the town, entirely depend, may be destroyed, and the water taken for a canal? It would have been madness and folly for the society to have invested their money under such an insecure charter; and if the legislature possessed the right contended for, the exercise of it would be an unexampled instance of legislative oppression and cruelty.

But this, in my opinion, is not the fair and reasonable construction of the charter of the society; nor did the legislature intend to put it in the power of the defendants to take from the society their water-power, whereby not only the society, but the whole population of the district, would be involved in ruin and distress. Such construction must be put on a statute as may best answer the intention which the makers had in view; and a thing which is within the letter of a statute, is not within the statute unless it be within the intention of the makers. And a statute will sometimes receive such equitable construction as is contrary to the letter. These are familiar rules of construction; and, in this case, it is the duty of the court to put, if possible, such a construction on the two charters as will prevent their interfering with

Lehigh Valley R. R. Co. v. Society &c.

The same principle has been recognized and applied in this court in the case of *Del., Lack. & West. R. R. Co. v. Erie Railw. Co.*, 6 C. E. Gr. 298, 303, 304. In that case the controversy between the parties was in reference to the use, by them, of the railroad through Bergen tunnel. That tunnel was constructed by the Long Dock Company, which company, on the 1st of November, 1859, granted to the Hoboken Land and Improvement Company and their assigns a perpetual right of way over certain lands and premises, and through the tunnel, for a single or double track railroad, including the right to use the track in the tunnel, provided that the use by the grantees should not, at any time, be such as to interfere with, obstruct, or delay the running of any trains of the New York and Erie Railroad Company, according to such time-tables as they should from time to time adopt. The rights of the Long Dock Company, at the time of the filing of the bill, were vested in

each other. And the fair and reasonable construction to be given to the provisions of the Morris Canal and Banking Company is, that the company shall have all the right and privilege of taking for their canal such lands and water as the legislature can grant, without violating their prior grants.

In *Wales v. Stetson*, 2 Mass. 143, Chief Justice Parsons, in giving a construction to a turnpike law, says, that the *rights legally vested in any corporation* cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation; and that, in the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing *rights of the public or of individuals* be not infringed. And, in that case, the court held that the proprietors of a turnpike road have no authority to erect a gate upon an existing highway, unless *specially authorized* by the legislature. And the same learned judge says, in *Coolidge v. Williams*, 4 Mass. 145, "that private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication."

If the court will restrain the construction of general words, so that the existing rights of the public or of individuals will not be infringed, certainly the reason is much stronger for restraining the construction of general words, so that rights held under prior grants will not be infringed.

A charter to a corporation is in the nature of a contract, and when rights have become vested under it, the legislature cannot divert those

Lehigh Valley R. R. Co. v. Society &c.

the Erie Railway Company, and those of the Hoboken Land and Improvement Company in the Delaware, Lackawanna and Western Railroad Company. In that case the chief justice, who sat for the chancellor, said in reference to the question in the cause relating to the relative rights of the parties to the use of the Bergen tunnel: "It was insisted that over a matter of this kind this court had no jurisdiction. The bill asks that, if deemed necessary, regulations should be established by this court, controlling the use, by these companies, of this tunnel, and that a receiver should be appointed to oversee the execution of such regulations; and it was the existence of this power which was denied on the side of the defendants. I have examined the cases cited, but have not found that any of them sustain the objection. * * * * In the case before me these parties possess a community of interest in this property. They are tenants in common of an easement, and if this court cannot protect the one against

rights, and they would remain though the charter were repealed. The right to the use of the waters of the Passaic, is legally vested in the society, as a corporation; and the court will never put such a construction on general words, in a subsequent charter, as will interfere with and injure that right. The legislature could not, in good faith, have intended that; and it would, therefore, be highly indecorous and improper for a court to put such a construction on the act. We are told by Blackstone, in his commentaries (1 *Bl. Com.*, 91), "that where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are, in decency, to conclude that this consequence was not foreseen by the parliament, and, therefore, they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it."

The construction contended for by the defendants is highly unreasonable, and no one can for a moment believe that the legislature, by the charter to the Morris Canal and Banking Company, intended to grant them a right to interfere with and materially injure the water-power of the society. Suppose, when the application for that charter was made, the legislature had been asked—Do you mean or intend to confer on the Morris Canal and Banking Company an unlimited right to take the waters of the Passaic river, if necessary, for the purpose of their canal, and thereby injure the manufactories at Paterson?—I dare to assert, that there was not a single individual of that body but who would have rejected such an idea with indignation. And nothing short of clear and express words could justify the court in giving to that charter such an unreasonable construction.

Lehigh Valley R. R. Co. v. Society &c.

the injustice of the other, the party whose rights are invaded is clearly without any adequate remedy, for it is certain that either of these companies, thus situated, can so act with respect to the common easement as to render it worthless to the other, and thus bring upon the latter incalculable mischief. The general cognizance of equity in cases of this kind, where property is enjoyed in common, will not, it is presumed, be disputed by any one, and I can perceive no reason why this power should not exist where two railroads are such tenants in common, as well as in other cases. In truth, as these companies, although technically private corporations, are in some measure public agents, there exists in such cases as the present, an additional reason why a judicial control should be extended, as far as possible, over their conduct towards each other. I have no doubt as to the jurisdiction of this court over this subject, and shall not scruple, therefore, to exercise it to the fullest extent that

The faith of the state, for the inviolability of the rights of the society acquired under their charter, is as solemnly pledged to the society as it is to the Morris Canal and Banking Company for the protection of their canal. Where is the express provision in the charter of the Morris Canal and Banking Company, that, after they have cut their canal and expended their million of dollars in filling it with the waters of the Hopatcong lake, the waters of that lake shall not be granted by the legislature for some other purpose? The guaranty is only an implied one, arising from the nature of the grant; but the faith of the state would be as grossly violated by the breach of that implied contract, as by the breach of an express one.

The right to hold and enjoy such lands, tenements and hereditaments as shall be needful for carrying on manufactures, is fully and clearly granted to the society, by a charter-right, and if it is not secured to them by their charter, I know of no right that is. If you may take their water, you may take their lands; and if you take their water and lands, what rights have they left, that are worth contending for?

The society do not and cannot claim, under or by virtue of their charter, a right to take the waters of the Passaic, without first acquiring such right by purchase; but they do claim, under and by virtue of their charter, a right to *acquire, hold and enjoy* those waters for manufacturing purposes. And when thus acquired and held, can they be taken away? Why give the society a right to acquire those waters, if, when acquired, they may be taken from them? If those waters were necessary to enable the society to introduce and establish manufactures, the use of them is equally necessary to enable the society to continue to carry them on. The very object, spirit and essence of the contract between

Lehigh Valley R. R. Co. v. Society &c.

the circumstances of the case may now, or at any time hereafter, appear to require.”

It is very manifest that this is a case in which it is particularly incumbent upon this court to intervene. Both parties are in the exercise of franchises granted by the legislature for the ultimate benefit of the public, and both are accordingly engaged in business of great importance to the public. The complainants claim the right to the use of the water, not only under legislative authority, but under such authority obtained with the consent of the defendant. The interruption of the business of the complainants would be a public as well as a private injury. In the suits at law, the society, by establishing their claim against the complainants, would only recover damages for past injury. They cannot in those suits obtain any guaranty for the future. Already there are two of those actions in progress. There may be more. If the society's rights have been invaded,

the state and the society, is the implied guaranty that the society may hold and enjoy everything necessary to carry on the business of manufactures.

In my opinion, then, the society has, by their purchase and occupancy, acquired, under and by virtue of their charter, a right to the use of the whole of the waters of the Passaic, at and above the great falls; and the Morris Canal and Banking Company has no authority or right, by their charter, to encroach on the rights of the society, by diverting the waters of the Rockaway, which is a principal branch of the Passaic, or in any other way, by which there will be a *diminution* of the quantity of water at the great falls.

But the society has no right to the waters of the Great pond, or any other waters which do not flow into and increase the waters of the Passaic above the great falls, and which the society has not appropriated, by occupancy, to the purposes of manufactures. The right granted to the society, and not used, of cutting navigable canals, cannot operate as a restriction upon the power of the legislature to grant canal charters; and, especially, after such a lapse of time; and a charter having been granted by the legislature to the defendants, who have appropriated the waters of the lake to the purposes of the Morris canal, the use of those waters is secured to the defendants by their charter. And any claim set up by the society, of a right to cut navigable canals wherever and whenever they please, in the state, is extravagant and unfounded. The society has no right to cut a navigable canal but “for the purpose of transporting goods, wares and merchandises to and from some manufactory by them established” in the district; and if, hereafter, the society exercise this right, they must do it without infringing

Lehigh Valley R. R. Co. v. Society &c.

this court is able, by a single suit, to ascertain and award damages for injury to them in the past, and to secure protection to the society therein for the future, and it can, at the same time, secure to the complainants their rights, providing for the peaceable enjoyment, by both parties, of their respective rights, whatever they may be. In view of the magnitude of the interests involved in the controversy, and the importance of constantly securing to each party their entire rights; and in view of the equities which the complainants set up, arising out of various transactions, covering a period of half a century, and consisting to no small degree of equitable estoppels, and in view of the liability of the complainants to a multiplicity of suits at law, it is incumbent on this court to draw the controversy into this forum for determination.

Equity will interpose to protect and secure the enjoyment of franchises granted by the legislature, on the ground that

on the prior rights of any other corporation that shall have appropriated, by virtue of their charter, any particular waters to their use.

The defendants admit, in their answer, that they have erected a dam and other water-works on the Rockaway river, near Dover and Powerville and other places, for the purpose of diverting into their canal such of the said waters as may be necessary, in order to carry into effect the objects of their incorporation. But they aver that the quantity of water passing into the falls by the natural current of the Passaic and its tributary streams will not be in any degree diminished by the canal, inasmuch as the waters to be drawn from the Hopatcong and those from one of the head branches of the Raritan river, after passing through and supplying the canal to Dover, will be there let into the Rockaway, and will thus introduce into the bed of the river as much water as will afterwards be taken from it, or from any of its tributary streams, for the purposes of the canal. And they further aver, that by means of the dam at the outlet of the lake, which has been raised by the defendants five feet above its former height, and which they contemplate, if necessary, to raise still higher, an extensive reservoir has been formed; and by the additional reservoir which, if necessary, they design to form, by a dam to be constructed at the outlet of Green pond, an *extra* and very considerable supply of water will be insured in time of drought, as well to the Morris canal as to the manufactories on the Rockaway and Passaic rivers, thereby obviating, in a great degree, the inconvenience to be apprehended from a scarcity of water during the summer months.

The question then is, Will the works which are begun, and are now in progress, for supplying the Morris Canal with water, occasion, if

Lehigh Valley R. R. Co. v. Society &c.

it furnishes the only complete and adequate remedy. *High on Inj.* §§ 570, 571, 572. The case of *Mercer & Somerset R. R. Co. v. Delaware & Bound Brook R. R. Co.*, decided in this court in 1875, furnishes an instance of the exercise of the jurisdiction of this court in controlling the action of contesting corporations in the conflict of their franchises granted by the legislature.

Where the party complained against professes to act by public authority to enter upon, and, to a certain extent, to use the land of other persons, and exceeds his authority, it is held to be a peculiarly proper case for the interposition of a court of equity. *Boston Water Power Co. v. Boston & Worcester R. R. Corp.*, *ubi supra*; *Agar v. Regent's Canal Co.*, *Cooper's Eq.* 77.

There is still another and cogent reason for drawing the litigation between these parties into this court. As before stated, the relations between the society and the canal com-

completed, a diminution of the quantity of water in the Passaic river at the great falls? The defendants have a right, in my opinion, to acquire, in the manner authorized by their charter, and to use, the water of the Passaic, if they can do it without prejudice to the rights of the society, who can have no serious ground of complaint, unless they sustain an *actual injury*, which they would do by a *diminution* of their *water-power*.

Whether Lake Hopatcong and the other means which the defendants contemplate resorting to for the purpose, if necessary, will supply a sufficient quantity of water for the whole length of the Morris canal, is a question which cannot now be satisfactorily solved, so as to justify the interference of this court.

It has been confidently asserted, both before the commencement of the canal and at the present time, that the supply of water from the lake will be much more than the canal will require. This is asserted by the defendants in their answer; and the commissioners appointed by the legislature to visit the canal, and who reported to the legislature at their last session, state, in their report, that the information afforded them, and their own observation, fully concur in the belief of the abundance of the waters of the lake, at all times, for the purposes of the canal. But, admit the question to be doubtful, the injunction ought not to issue. The route of the Morris canal has long since been known to the society; large sums of money have been expended, and the canal is now in a great state of forwardness. Under these circumstances, it would not, I think, be a sound exercise of discretion for the court to interfere, on the ground of apprehended danger.

Lehigh Valley R. R. Co. v. Society &c.

pany, in respect to the use of the water, have existed for more than half a century. Three suits have been brought in this court on the subject. In disposing of the question between the parties, resort must be had to the pleadings and testimony in those causes. They are here. And further, in view of the character of the subject-matter of the controversy, this is a more appropriate forum for the determination of the questions between the parties than a court of law. More deliberate consideration can be given to it here than can be given to it by a jury. A matter so complicated and involved will be better decided by this tribunal than by one in which there is less opportunity for consideration and deliberation, both in the conduct of the litigation and in the decision. In *Black v. Shreve*, 3 Hal. Ch. 440, 457, the complexity of the covenant, and the multiplicity of suits to which it might give rise at law, were regarded as

Here the question is, whether the works of the defendants will or will not be a nuisance to the society. In a *plain case of nuisance*, the court will interfere by injunction, and will not suffer the nuisance to go on, to the prejudice of the party complaining. But I cannot grant the injunction upon assertions, calculations and mere speculative opinions, and where the injury to the defendants might be irreparable if the court should mistakenly interfere.

It is a circumstance of considerable weight, in my mind, that in December, 1826, Mr. Colt, the governor of the society, in a letter addressed to Mr. Colden, president of the Morris Canal and Banking Company, objected to the present location of the Morris canal, only on the ground that this route would not afford the expected accommodation to the town of Paterson, and in respect to the water he says: "*I am led to believe*, from what I hear, that you will take more water to supply your level to pass this, than you bring from your summit level, and of course to our injury." From which it appears that Mr. Colt is himself doubtful whether the Morris Canal and Banking Company, in using the water of the Rockaway, will take more water than they bring from the summit level, and that he did not object to their making use of the water, if the defendants would adopt the lower instead of the upper route. He says that he is led to believe that they will take more water than they will bring, but he does not positively assert that such will be the fact. This is a particular case, attended with special circumstances, and where no *actual injury* has been sustained, but only danger apprehended. The defendants must, therefore, be left to proceed at their peril. The complainants have now given them notice, by their bill, of their rights, "and stronger notice by this motion; if they do wrong, it is at their peril." See *Att'y-Gen. v. Doughty*, 2 Ves. 453-4.

The injunction is refused.

Bower v. Hadden Blue Stone Co.

grounds on which this court might properly entertain a bill for the adjustment, in one suit, of the contribution called for by the covenant.

The motion to dissolve will be denied, with costs.

FREEMAN BOWER

v.

THE HADDEN BLUE STONE COMPANY and DANIEL M. LYON.

1. Any writing which clearly appropriates a fund or property to a person, will, in equity, be esteemed an assignment. Equity disregards mere form.

2. A suitor whose title is purely equitable, has no remedy at law, but must resort to equity.

3. When the parties to a contract have expressed their meaning by plain words, there is nothing to construe, and in such a case all a court can do is to enforce the contract.

4. A purchaser who co-operates with the vendor in the misappropriation of purchase-money which he knows was raised for the benefit of a third person, renders himself liable to the person defrauded to the extent of the fund misapplied with his connivance.

On bill, answers and proofs.

Mr. Ludlow McCarter and *Mr. John R. Emery*, for complainant.

Mr. Joseph Coult, for defendant Lyon.

Mr. John A. Miller, Jr., for the corporation.

Bower v. Hadden Blue Stone Co.

THE VICE-CHANCELLOR.

The instrument which gives rise to this suit is in these words :

"This is to certify that, in consideration of a \$1,000 bond on the town of Harrison, to me in hand paid by Freeman Bower, of the town of Harrison, Hudson county, New Jersey, I, Daniel M. Lyon, treasurer of the Hadden Blue Stone Company, do hereby agree to assign, transfer and set over unto the said Freeman Bower such an interest in the judgment obtained by the Hadden Blue Stone Company against James B. Smith, of the town of Harrison, in the supreme court of the state of New Jersey, for the sum of \$2,501.59, besides costs of suit, on the 24th day of November, 1873, as will secure to said Bower the repayment of the sum realized by me on said bond, paid by him as aforesaid, on account of the aforesaid judgment against said James B. Smith. Witness my hand, this 17th day of December, 1873. Daniel M. Lyon, treasurer."

It is admitted that \$900 was realized on the bond. It also appears that in April or May, 1874, a debtor of James B. Smith (the judgment debtor) paid to the defendant Lyon, on account of the judgment, the sum of \$443.56, and that on the 18th of June, 1874, Smith's real estate was sold, under the judgment, for \$1,700, making the sum total realized \$3,043.56. With costs added, the total amount of the judgment, at the date of its recovery (November 24th, 1873) was \$2,539.35. The real estate was struck off to Mr. Lyon. He says he purchased for the plaintiff. His signature to the memorandum of purchase has the word "treasurer" written under it. The sheriff conveyed the property to him, but he says this was done pursuant to an agreement subsequently made by the corporation and himself, by which it agreed to sell him the land for \$100 less than the amount of his bid. He also says he has paid to the corporation all the money he received on the judgment. He was its treasurer, also a director, and the owner of two-fifths of its stock. At the time he paid the purchase-money of the land, he admits the corporation was badly crippled. He says it was indebted to him in the sum of \$17,000 or \$18,000, and had sunk more than three-fourths of its capital. With a

Bower v. Hadden Blue Stone Co.

paid-up capital of \$100,000, its franchise and all its other property were sold, on the 5th of March, 1875, for \$13,000. According to his statement its losses mainly occurred in 1871 and 1872. His account of the payment of the \$1,600 is both confused and contradictory. It is impossible to resist the belief that, either he has a very treacherous memory, or is unwilling to disclose all he remembers.

Three questions were discussed on the hearing: First, is the complainant in the proper forum; second, does the contract give the complainant the right to be first paid out of the moneys realized on the judgment; and, third, is the defendant Lyon liable to the complainant for any part of the purchase-money of the land purchased by him.

On the argument, it was admitted that the defendant Lyon had authority to bind the corporation by the contract of December 17th, 1873. Without such concession or proof showing that he was specially empowered, I think it is quite clear the contract could not be regarded as the act of the corporation. It was, in effect, a borrowing of money by pledging the property of the corporation, and this, in my view, the treasurer of such a corporation would have no power to do in virtue of his office or employment. To make it the act of the corporation, special authority would have to be shown.

I think it is entirely clear, the complainant has a right to a remedy in equity. His contract is not an assignment, but merely gives him a right to an assignment. His title, therefore, is purely equitable. Without an actual assignment or legal title, a court of law is powerless to give him any aid; but equity disregards mere form; if the right exists, even if it is not formally manifested, it will afford both remedy and relief. In equity no particular form is necessary; any writing, or even an act, which plainly makes an appropriation of the fund or property, will be esteemed an assignment. 2 *Story's Eq. Juris.* § 1047; *Galway v. Fullerton*, 2 *C. E. Gr.* 389.

Nor do I think there can be the slightest doubt about what the contract means. It was drawn by the counsel of the

Bower v. Hadden Blue Stone Co.

corporation, most probably under the direction of the officers who negotiated it. The defendants selected the language in which their obligation should be expressed, and are not, therefore, in a position to ask that its words shall not be read according to their natural force, nor that full effect shall not be given to their plain sense. The contract plainly says that such an interest in the judgment shall be assigned to the complainant as will secure to him the sum realized on the sale of his bond. This language is so clear as to leave no room for construction. The parties have said, by very plain words, what they meant, and where that is the case the court has no duty to perform but to carry their meaning into effect. The complainant is to have such an interest as will give him his money back, even if it takes all. No particular or specified part or interest is carved out or separated, but he is to have so much, or whatever will repay him. The same idea would have been expressed if the language had been that he was to have the whole judgment, or so much or such part of it as should be sufficient to repay him. He was to be repaid in any event; his right is made paramount over every other right, and he would, therefore, have been entitled to his money, even if only a sum just sufficient to repay him had been collected.

Can the complainant hold the defendant Lyon for any part of the purchase-money of the land? The purchase-money was not paid to the sheriff; if paid at all, it was paid either to the corporation, its creditors or stockholders. It is impossible to say to whom it was paid, or whether it was paid at all. The defendant's evidence on this point is confused and contradictory. It is clear, a payment to the corporation did not constitute a payment to the complainant. Their rights were several and not joint—the complainant occupied a position of superior right,—hence a payment to the corporation was not a payment to him. The relation of principal and agent did not exist, either in fact or legal theory. If Mr. Lyon paid the money to anybody, he paid it with full notice of the complainant's rights. He nego-

Bower v. Hadden Blue Stone Co.

tiated the contract, and signed it for the corporation. Between the day when he bid off the land and the day when he got his deed, he had an interview with the complainant, in which he tried to induce him to take the land, but he says he refused, stating that he wanted his money, and he would not accept anything else. He also knew the corporation was deeply in debt and in sore need of money. He knew the money belonged to the complainant, and that he demanded its payment; a payment to any other person, under such circumstances, was not only entirely without warrant, but wantonly reckless or fraudulent. But it is said Mr. Lyon purchased the land of the corporation, and was therefore obliged, by force of his contract, to pay the purchase-money to the corporation. As already remarked, the proof of payment is very unsatisfactory. The books of the corporation, which, it is fair to assume, would have given full information on this subject, were not produced, although their production was demanded by legal process. The defendant could have produced them, if he had desired to do so. His conduct in this respect evinces a determination to conceal what he ought to have been anxious to exhibit, if his statements were true. His conduct renders it impossible to believe that the books would have confirmed his story. But, even if it be conceded that he made the purchase of the corporation, and paid it the whole of the purchase-money, still, I think he is unquestionably liable. The money came to his hands, subject to the complainant's rights; the moment it passed from the individual to the treasurer—if it did pass at all—he held it in trust for the complainant. He had full notice of the trust, having been the instrument by which it was created. He co-operated in the misapplication of the money—in fact, solely directed the misappropriation. The wrongful act of the trustee was performed by him. A purchaser who co-operates with the vendor in the misapplication of purchase-money which he knows is raised for the benefit of a third person, or, either directly or indirectly, aids the vendor in diverting the

Partridge v. Wells.

money, renders himself liable to the person defrauded to the extent of the fund misapplied with his connivance. *Nicholls v. Peak*, 1 *Beas.* 69; 1 *Lead. Cas. in Eq.* 114. The defendants' liability rests upon principles of undoubted justice.

The complainant is entitled to a decree against both defendants.

CHARLES PARTRIDGE

v.

EDWIN F. WELLS and MARGARET S., his wife.

1. Property purchased by one copartner with the funds of the firm, and title taken in the name of his wife, is partnership assets.

2. When it clearly appears on the face of the bill that the complainant's right of action is barred, advantage may be taken of the statute of limitations by demurrer.

3. The bar of the statute is as perfect an answer in equity as at law, to actions covered by the statute.

4. The statute does not apply to such trusts as are not cognizable at law, and upon which a remedy can only be had in equity.

On demurrer.

Mr. A. V. Schenck, for demurrants.

Mr. S. H. Jones, for complainant.

THE VICE-CHANCELLOR.

The bill in this case presents the following facts: On the 19th day of August, 1862, a copartnership was formed by the complainant, the defendant (Edwin F. Wells) and one Henry D. Partridge, to carry on the produce commission business in the city of New York, which continued until

Partridge v. Wells.

January 3d, 1871, when it was dissolved by the death of Henry D. Partridge. A settlement was then made by the complainant and defendant, and a new firm formed, consisting of themselves alone, which continued in the prosecution of the same business until October 12th, 1875, when it was dissolved by agreement. During the existence of the first firm, and in the years 1868 and 1870, Wells fraudulently abstracted from the firm over \$5,000, and invested it in real estate, in the name of his wife; and during the existence of the second firm, and in the years 1872 and 1874, he abstracted a further sum of over \$4,000, and purchased real estate, and procured it to be conveyed to his wife. A part of this last sum was also used in the purchase of furniture and other personal property. In addition to the two sums already mentioned, it is said Wells has made improvements on the lands held by his wife with money belonging to the copartnership and paid the taxes, interest on mortgages and insurance thereon.

The bill avers that Wells was found to be indebted to the complainant when the last dissolution took place (October 12th, 1875), in the sum of \$33,579.30, and that he was then insolvent. It prays that an account of the expenses, receipts and profits of the copartnership may be taken; that the property purchased by Wells with the moneys of the firm, and now held by his wife and himself, may be declared to be partnership assets, and be applied in discharge of the amount which may be found to be due to the complainant; for an injunction restraining the transfer and encumbrance of the property purchased with partnership funds, and for general relief. The bill was filed January 24th, 1877. It does not show when the complainant was first notified or obtained knowledge of the frauds charged against the defendants.

The defendants do not answer, but attempt to meet the complainant's case by a demurrer, alleging want of equity and multifariousness. On the argument no attempt was made to sustain the demurrer, except on the ground that the complainant's right of action was barred by lapse of time.

Partridge v. Wells.

The case made by the bill presents, undeniably, a good cause of action. A case of such extreme merit is shown as, in the language of Lord Hardwicke (*Brereton v. Gamul*, 2 *Atk.* 240), entitles the complainant to all the favor the court can show him. Upon the question whether or not the facts, independent of any question of laches, show a right to relief, *Shuler v. Trowbridge*, 1 *Stew.* 595, is an authority directly in point, and decisive. Partners hold to each other the relation of trustee and *cestui que trust*. A trustee can derive no gain to himself from the employment of the trust fund. The fact that the trustee has invested the trust property, or that which represents it, in the name of his wife, will give her no right to the property as against the *cestui que trust*. Justice Van Syckel, in the case just cited, speaking for the whole bench of the court of errors and appeals, says: "When once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so, likewise, unless he has, in good faith, acquired a subsequent interest for value; for a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning."

Is the complainant's action barred by the statute of limitations? A defendant may claim the benefit of the bar given by the statute by demurrer, when, by the case made by the bill itself, it clearly appears that the complainant's right of action is spent by lapse of time; but when it does not so appear, the statute can only be set up by plea or answer. *Story's Eq. Pl.* §§ 503, 751.

To all actions covered by the statute, the defence given by it is as perfect an answer in equity as at law. But it does not embrace all actions. Actions founded on certain trusts are not within it. The statute does not apply to actions founded on a direct or strict trust, such as are not cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of a court of equity. This is the rule as stated

Partridge v. Wells.

by Chancellor Kent (*Kane v. Bloodgood*, 7 Johns. Ch. 90, 113), and adopted by Chancellor Green (*Marsh v. Oliver*, 1 McCart. 259), and also by Chancellor Zabriskie (*McClane v. Shepherd*, 6 C. E. Gr. 76). Chancellor Kent says the principle was first stated with precision by Lord Macclesfield, in *Lockey v. Lockey*, Prec. Ch. 518. That was a bill for an account of the profits of an estate received by the defendant while the plaintiff was an infant. The defendant had possession under an agreement constituting him a trustee for the infant. The plaintiff did not file his bill until more than six years had elapsed after he attained full age. Lord Macclesfield held, the statute barred his action in equity, as it would have done a common law action of account, stating that the plaintiff might have had his action of account at law, and therefore there was no necessity for his seeking relief in equity. The same principle has been declared by Judge Story. He says: "As to cases of merely constructive trusts created by courts of equity, or cases which are treated, for some purposes, as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them." *Robinson v. Hook*, 4 Mas. 139, 152.

The test, then, obviously prescribed by the rule is, Had the suitor a remedy at law which he has lost? If the complainant in this case had a complete remedy at law, which has been lost by lapse of time, he is not entitled to the remedy he seeks here. Upon the admitted facts, as the record now stands, the complainant had, at one time, an unquestionable right to have the lands and other property purchased with the money of the copartnership, declared to be partnership assets, and distributed according to the rights and equities of the copartners. A court of law is powerless to give such relief; it can only be administered in equity. This, in my view, is the complainant's only adequate and appropriate remedy, and that he has always been without a complete remedy at law; but if a doubt could be raised on this point, I am decided in opinion this is not a case in which any inge-

Lehigh Valley R. R. Co. v. McFarlan.

nuity should be exercised to devise a way by which the defendants shall be relieved from making discovery, upon their oaths, whether they have committed the frauds charged against them or not.

Let the demurrer be overruled, with costs.

THE LEHIGH VALLEY RAILROAD COMPANY and THE MORRIS
CANAL AND BANKING COMPANY

v.

HENRY McFARLAN and others.

1. A complainant cannot make one case by his bill, and another by his proofs, and still have a decree.

2. Title by adverse user rests upon the presumption of an actual grant which has been lost.

3. To raise the presumption of a grant where title to an easement is asserted, it must be shown that the use has extended over a period of twenty years, and has been for that period continuous and peaceable.

4. Proof of acquiescence by the owner of the servient lands, in the exercise of the adverse right, is indispensable in proving title to an easement by adverse user.

5. Where the user has been exercised by force, or by permission, or in the face of protests and in defiance of resistance, a grant cannot be presumed.

6. Resistance by words is sufficient to prevent the presumption of a grant of an easement.

On final hearing, on bill, answers and proofs.

Mr. Alfred Mills and *Mr. Thomas N. McCarter*, for complainants.

Mr. Henry C. Pitney, for defendants.

Lehigh Valley R. R. Co. v. McFarlan.

THE VICE-CHANCELLOR.

This is an injunction bill. The complainants seek to have the defendants perpetually restrained from interfering with a dam on the Rockaway river, at Dover, in the county of Morris. The Morris canal crosses the Rockaway river, at Dover, and is so built that the river, at that point, forms part of the canal. A short distance below the point where the canal intersects the river, the canal company, in constructing the canal, built a dam across the river which serves as one bank of the canal. It was built for the purpose of damming back the water of the river so as to get sufficient water to float boats through that part of the canal constructed within the river. At the time this suit was brought it had been standing more than forty years. It consists of stone-work at the bottom and heavy timbers on the top. The defendants do not deny the complainants' right to maintain that part of it which is permanent. But the complainants claim the right to increase the height of the permanent structure by placing on it, between upright iron bolts driven in the timbers, movable boards (usually called flash-boards) eight inches wide, extending from one end of the dam to the other, and to keep them there each year during the time the canal is open for navigation. This claim is the subject of the contention. The defendants deny the right set up by the complainants, and provoked this suit by repeatedly removing the boards from the dam in July, 1875. The defendant Henry McFarlan is the owner of a rolling-mill built on the west bank of the river, over seven hundred feet above the dam. The mill is run by water-power. The water from his wheel is discharged through a tail-race, emptying into the river six hundred and eighty-six feet above the dam. It is not disputed that, when the flash-boards are on and the dam is full, the water is thrown back on the wheel of the rolling-mill to such an extent as to greatly impair its power. There has been a mill on this site for many years. The defendant has operated a mill there, as owner, since 1856.

Lehigh Valley R. R. Co. v. McFarlan.

The important question of the case is, Have the complainants a right to increase the height of their dam, each year during the navigation season, by the addition of the flash-boards? The bill presents a case of strict legal right; no consideration of purely equitable cognizance is mentioned. Protection is sought in this court because the injury alleged is irreparable. The bill avers, first, that the right of the complainants to maintain the dam, with the addition of the flash-boards, has been fully acquiesced in by all persons ever since its first exercise, more than forty years ago, and that they have never been disturbed in the enjoyment of it; and, second, that before its construction the canal company acquired of the persons interested the right to construct and maintain the same. No attempt has been made to show a right acquired by the exercise of the power of eminent domain, nor by the production of an existing written grant. The complainants' right, therefore, if they are restricted to the case made by their bill, is such only as they have acquired by adverse use. That, in my view, is the only ground upon which, according to the established practice, they can ask relief. They must recover, if at all, upon the case made by their bill. They cannot make one case by their bill and another by their proofs, and still have a decree. *Andrews v. Farnham*, 2 Stock. 91; *Parsons v. Heston*, 3 Stock. 155; *Howell v. Sebring*, 1 McCart. 84, 90; *Marsh v. Mitchell*, 11 C. E. Gr. 497, 499; *Wilson v. Cobb*, 1 Stew. 177.

This action was commenced July 29th, 1875. There is no proof of the use of flash-boards prior to 1845. A single witness swears he assisted in putting them on in that year. Another says they have been put on every spring and taken off every fall, for twenty years, as near as he can recollect. He testified May 31st, 1876. The evidence will, perhaps, justify the conclusion that they have been used every year during the summer, from 1845 to 1875. The evidence also tends to show that they were occasionally removed by the defendant when they raised the water to such a height as to obstruct the wheel of his mill. The dam was repaired in

Lehigh Valley R. R. Co. v. McFarlan.

the spring of 1857, the old timbers being removed and others being put in their place. The person who superintended the work done in repair, swears the height of the dam was increased three inches—the timbers removed being eight inches, and those put on being eleven—and that the addition was made by direction of the supervisor. Mr. William Groff, who acted as supervisor from 1856 to 1874, admits constant efforts were made, during his employment, to raise the water. He says: “The canal has always been raised; there is no use talking, we did raise the water, for that was the customary thing for us to do; it has been the custom of the thing, and if it was only added to inch by inch, we did it.” It is not shown that the defendants’ wheel suffered any serious obstruction from back-water prior to 1857, but in that year, after the repairs were completed and the flash-boards were put on, it became so great as to seriously impair the capacity of the mill. It is undisputed that Mr. McFarlan, in that year and in subsequent years, both in person and by his agents, forbade the use of the boards and denied the right of the canal company to put them on. In the spring of 1858, the resistance of his agent, Mr. Hinchman, was so determined that the person who was ordered to put them on, refused, for three days, to incur the risk; and it was not until the resident engineer went to the dam, himself, supported by half a dozen canal employes, and threatened Mr. Hinchman with personal injury if he persisted in his resistance, that the boards were put on. His opposition was overcome by superior force. The boards put on, on this occasion, were removed later in the season, and others, less in width, put in their place. The evidence shows conclusively that, from 1857 down to the commencement of this suit, Mr. McFarlan has constantly disputed the right claimed by the complainants, and forbade its exercise. The supervisor says the boards were frequently, during this period, put on in defiance of Mr. McFarlan’s protest, in which he declared: “You have no right to put them on, and the day is coming when you shall not do it.” It is

Lehigh Valley R. R. Co. v. McFarlan.

undeniable, the right was exercised in defiance of resistance so far as resistance could be made by words, and in spite of a threat that, if it was persisted in, resort would be had to more efficacious means of protection.

The right claimed is an easement of flowage, and can only be supported by proof of facts which will justify the presumption of a grant. Every riparian owner has a right to have the waters of a natural stream passing through or along his land, to flow in their accustomed channel freely, without obstruction or diversion, and he who attempts to obstruct their natural course must show a grant, either actual or presumptive, or answer for an unlawful act.

Title to an easement acquired by adverse user rests upon a presumption of an actual grant which has been lost. The legal theory is, that no man will, knowingly, allow another, peaceably and uninterruptedly, to have the exclusive adverse enjoyment of a valuable right in his lands, under a claim of title, for twenty years, unless the adverse right is founded on a grant which he is bound to respect; and hence, in every case where such a user is shown, the law, for the purpose of quieting titles and avoiding disputes respecting stale rights, presumes that an actual grant was originally made. To raise this presumption it must be shown that the use or enjoyment has extended over a period of twenty years; and, also, that it has been continuous and peaceable. Long—that is, during the time required by law; continuous—that is, uninterrupted by any lawful impediment; and peaceful—because if it be contentious and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be *longus usus, nec per vim, nec clam, nec precario*. *Gale & What. on Eas.* 122, *marg. note*; *Washb. on Eas.* 112; *Sargent v. Ballard*, 9 *Pick.* 251.

To show that it was peaceful, proof of acquiescence by the owner of the servient land in the exercise of the right, is indispensable. The presumption of a grant can only be made when it is a natural and logical consequence of the

Lehigh Valley R. R. Co. v. McFarlan.

conduct of the parties. If he who claims an easement in the lands of his neighbor, has openly and continuously, for twenty years, asserted it, by a uniform course of conduct, and actually enjoyed it, and his neighbor has neither denied nor disputed his right, but, by long silence and submission, has conceded it, the presumption that he submitted to the invasion because he could not help it, is natural, reasonable and logical, and does not seem to be very far from absolute certainty. But where the user has been exercised by force, or by permission, or in the face of protests, and in defiance of resistance, such a presumption is impossible. Reason and justice are both against it. In such a case, positive evidence of both acts and words excludes all presumption. Resistance, by verbal remonstrance or denial, is sufficient. A citizen of this state is not required to break the peace or commit a trespass to prevent an invasion of his lands from ripening into a title.

At common law, any acts of interruption or opposition from which a jury might infer the enjoyment was not rightful, were sufficient to defeat the effect of the enjoyment, the question being, whether, under all the facts of the case, such enjoyment had been had under a concession of right. *Gale & What. on Eas.* 123, *marg. note*. The supreme court of Massachusetts, in *Powell v. Bagg*, 8 *Gray* 441, said: "An easement in the land of another can be acquired by adverse user only when it appears such user was exercised with the acquiescence of the owner. From such use of an easement for twenty years, the law will presume a grant, but if, before the lapse of that time, the owner of the land, by a verbal act on the premises in which the easement is claimed, resists its exercise and denies its existence, his acquiescence in the right is disproved, and the essential elements of a title by adverse use are shown not to exist. Such a case is unlike the case where a title to land is claimed by adverse possession, and where the true owner is disseized. There a mere verbal command to leave or prohibition to occupy, is not sufficient to overcome the presumption arising from the

Lehigh Valley R. R. Co. v. McFarlan.

fact of the actual possession by the adverse claimant. But the title to an easement stands on entirely different ground. The owner of the servient lands remains in possession; he is not disseized; the title of the person claiming the easement rests, chiefly, on the owner's acquiescence in the adverse use, and any evidence which disproves acquiescence, disproves his title." And to the same effect is the reasoning of Justice Woodbury, in *Stillman v. White Rock Manf. Co.*, 3 Woodb. & M. 538: "A grant of an easement will not be presumed, when it appears that the owner of the servient estate has frequently, during the period of its exercise, remonstrated against its exercise. The exercise of the right must be wholly peaceable, and always hostile, to constitute a good prescription." The same doctrine, substantially, is declared in *Nichols v. Aylor*, 7 Leigh 546; *Livett v. Wilson*, 3 Bing. 115; *Eaton v. Swansea Water Works Co.*, 17 Q. B. 267, 275. It rests on reason and is founded in justice.

According to the rules just stated, the proofs render the presumption of a grant in this case simply impossible. Their force, in disproof of such presumption, is irresistible. Acquiescence means assent and concession, not contention and resistance. No title by adverse user is shown.

It was insisted, on the argument, that, independent of any question of legal right, the acts and omission of Mr. McFarlan estop him from denying the complainant's right. It is claimed that the proofs show that he stood by passively for a long time, and permitted the complainants to expend large sums of money in deepening their canal and enlarging their boats, under the belief that they had an easement of flowage in his lands, and also that he, as director of the canal company, joined in the execution of the lease under which one of the complainants is now operating the canal. But, in my view, neither fact is established by the evidence. I regard it as entirely clear that the complainants were not misled by anything Mr. McFarlan said or did. He constantly resisted the right they now assert, and compelled them to exercise it in strife. It is true, he incidentally

Stout v. Seabrook's executors.

stated that he was at one time a director of the canal company, but it does not appear that he was so at the time the lease was negotiated or executed. So important a fact ought not to be presumed at this juncture, especially when it appears that the party seeking the benefit of it had it in his power, by a single question on cross-examination, to show whether it existed or not. But the decisive answer to this insistent is, that no such ground of relief is presented by the bill. Before the defendant can be deprived of any defence he may have to the complainants' action, on the ground of estoppel, he has an undoubted right to be plainly and distinctly informed of the facts which create the estoppel, and to be afforded an opportunity to disprove them.

In my judgment, the complainants have failed to establish a title to the easement they claim. Their bill must therefore be dismissed, with costs.

THOMAS B. STOUT

v.

THE EXECUTORS OF HENRY H. SEABROOK, deceased.

1. To render the lapse of the statutory period a bar to an action for an account by one partner against another, it must appear that the account has been closed for six years.

2. Great delay is a good bar in equity.

3. A decree requiring a copartner to account, should be denied in every case where it appears the party seeking the account, has, by his laches, rendered it impossible for the court to do full justice to both parties.

4. If, in an action for an account, the court is satisfied nothing is due to the complainant from the defendant, a dismissal must be directed.

On final hearing on bill, answer and proofs.

Stout v. Seabrook's executors.

Mr. William H. Vredenburg and *Mr. Joseph D. Bedle*, for complainant.

Mr. George C. Beekman, for defendants.

THE VICE-CHANCELLOR.

This is a bill for an account. Henry H. Seabrook and Eusebius M. Walling formed a copartnership in 1851, to carry on the business of country merchants, at Keyport, Monmouth county, and continued together as copartners until April 1st, 1858, when they dissolved by consent. It is admitted the firm, at that time, was largely indebted to Mr. Seabrook. He retained the assets. There is some dispute whether he kept them under a written or verbal contract, but it is quite unimportant whether it was one or the other, for it is agreed the terms of each were substantially the same. He was to convert the assets into money, pay the debts, and, if anything remained, pay Walling his share of the surplus. At the dissolution, the value of the merchandise on hand was estimated at \$1,400; and the firm also held four mortgages, securing principal sums amounting in the aggregate to \$1,421.48, besides a large number of notes and accounts on book. Walling, after the dissolution, made two conveyances to Seabrook; the first bears date September 5th, 1859, and conveys two tracts of land upon which Walling, February 19th, 1858, executed a mortgage to the firm for \$900; and the second bears date January 14th, 1860, and conveys three parcels of land. The first purports to be founded on a consideration of \$975, and the second on a consideration of \$270. Walling says they were not intended to be absolute conveyances, but were merely given to further secure the payment of Seabrook's claim. The complainant, on the 11th of April, 1851, became surety on a sealed bill, made by Walling to Seabrook, for \$2,200. This obligation remained outstanding until December 11th, 1860, when the complainant paid a part of the interest in arrear in cash, and gave his own bill to Mr. Seabrook for

Stout v. Seabrook's executors.

\$2,256, in lieu of it. Since then the complainant has made three payments on his bill. The first, of \$656.08, was made January 12th, 1864; the second, of \$650, April 12th, 1864; and the last, of \$738.35, August 10th, 1872. The last, he says, discharged the whole amount due. It will be observed, his payments amount to less than the principal sum; how the balance was paid does not appear. The last payment was made to Mr. Seabrook's executors, he having died March 30th, 1872. On the 6th of April, 1860, Walling assigned to the complainant whatever interest he might have in the assets of the firm, after the payment of Seabrook's debt. Both Walling and the complainant have had free access to the books and papers of the firm at all times; the complainant has had possession of the books part of the time, and made collections on them for the benefit of Seabrook. In April, 1867, the complainant had possession of the books for some weeks, and they were then carefully examined by him, his son Joseph and Mr. Walling. Joseph swears that at that time he made a copy of the account between Mr. Seabrook and the firm, appearing on the books, by which it appeared there was still due to Mr. Seabrook the sum of \$545.80. The accuracy of this account is now assailed; it is said it contains improper charges and omits large credits, and that by an accurate statement of the account, at that time Mr. Seabrook was indebted to the firm in a large sum. Every fact now known to the complainant was known to him in 1867. It is not pretended that he ever questioned the accuracy of the account in the presence of Mr. Seabrook, or asked that it be corrected or changed in a single particular. Since the examination and copy were made, the complainant has paid to the representatives of Mr. Seabrook the balance due on his sealed bill. Mr. Seabrook has died, and one of the books containing a part of the account in question, as well as other important evidence, has been lost.

To this action, the defendant, in the first instance, set up the statute of limitations, by plea. The bill was filed May

Stout v. Seabrook's executors.

20th, 1874. On the issue thus raised, it was shown that two payments had been made to Mr. Seabrook, on what was then believed to be firm claims, within six years immediately preceding the commencement of the suit, and the plea was therefore found not true, and overruled. It was held that, to render the lapse of the statutory period a bar to an action for an account by one partner against another, it must appear that the account has been closed for six years, and that no transaction has occurred within that time for which the defendant is liable to account, and that the bar of the statute does not begin to run against each item from the time it becomes a part of the account. *Coll. on Part.* § 374; *Barber v. Barber*, 18 Ves. 286; *Ault v. Goodrich*, 4 Russ. 430; *Coster v. Murray*, 5 Johns. Ch. 522, 530; *Atwater v. Fowler*, 1 Edw. Ch. 417, 423.

The defendants have since answered, and they now resist the complainant's demand for an account upon two grounds: first, that his laches bars his demand, and, second, that there is nothing due to him from them.

Great delay is a great bar in equity. 1 *Story's Eq. Juris.* § 529; *Fonbl.*, Book 1, § 27; *Chalmer v. Bradley*, 1 Jac. & W. 51, 62; *Ray v. Bogart*, 2 Johns. Cas. 432; *Piatt v. Vattier*, 9 Pet. 405, 416. More than one hundred years ago Lord Camden said: "A court of equity will always refuse its aid to a stale demand, when the party has slept upon his rights, or acquiesced for a great length of time. Nothing will call forth the activity of a court of equity but conscience, good faith and reasonable diligence." *Smith v. Clay*, 3 Bro. C. C. 640, note. A court of equity will not permit accounts to be overhauled in favor of a party who has slept upon his rights, without just cause, for a great number of years; and more especially as against the representatives of a party who may be supposed to have had the means of defence in his life-time, but who may have left his successors without the requisite vouchers. *Mooers v. White*, 6 Johns. Ch. 360, 368. The court is always unwilling to decree an account when the transactions have become obscure and entangled by delay. *Rayner v.*

Stout v. Seabrook's executors.

Pearsall, 3 *Johns. Ch.* 578, 585. The justice of this doctrine is obvious. He who delays asserting his rights until the proof in vindication of them is so indeterminate that it is very difficult to decide whether what seems to be justice to him is not injustice to his adversary, ought to lose all right to the aid of a court of conscience, for, by his laches, the path of justice has become so obscure that it cannot be traced with certainty. The law assists those who are vigilant, not those who sleep upon their rights.

No inflexible rule can be prescribed as to the lapse of what period shall disentitle a suitor to an account. The court may refuse to decree an account even when an action is not barred by the statute. Judge Story says: "In matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy" (1 *Story's Eq. Juris.* § 529), and Lord Eldon, in *Foster v. Hodgson*, 19 *Ves.* 179, 185, said: "If there has been that delay or forbearance that makes it not illegal, but inequitable, to demand an account, this court will deny it, and send the plaintiff away without relief." Each case must be controlled by its own peculiar circumstances, but I think it may be laid down as a safe general rule that a decree for an account should be denied in every case where it clearly appears the party seeking it has, by his laches, rendered it impossible for the court to do full justice to both parties, whether the infirmity of the case consists in the death of a party, loss of evidence or other cause.

Tested by this rule, it is manifest the complainant has no case. He does not demand an account until his delay has put him in the best possible position, and his adversary in the worst. He seeks to turn his faults into an advantage. It is not until the tongue of the person who had the most perfect knowledge of all the transactions of which an account is sought, is silenced by death, and the memory of all others who ever knew anything about them is obscured by the lapse of time, and very important written evidence, bearing strongly, most probably, in refutation of his claim, is lost,

Stout v. Seabrook's executors.

that he asks that an account shall be rendered to him. Why, the very first step which it is necessary to take in decreeing an account, shows how utterly impossible it is for the court to do anything like complete justice.

What sum did the firm owe Mr. Seabrook at the dissolution? This question must be answered at the very threshold of the investigation. The defendants have put in evidence a written acknowledgment by Mr. Walling, showing that, on April 1st, 1856, it was \$9,188.22, and also a mortgage made by Mr. Walling to the firm, for \$900, bearing date February 19th, 1858. And the complainant points to four entries in a book belonging to Mr. Seabrook, by which it appears the balances due to him from the firm were as follows: April 1st, 1858, \$5,831.13; January 1st, 1859, \$4,293.83; January 1st, 1860, \$3,171.65, and January 1st, 1861, \$2,612.49. No subsequent entry appears. Mr. Walling is utterly unable to explain how the \$9,188.22, due April 1st, 1856, was cut down to \$5,831.13 on April 1st, 1858. He does not pretend that the sum he acknowledged due to Mr. Seabrook April 1st, 1856, was not just and true, nor that it was reduced by profits made between April 1st, 1856, and April 1st, 1858, nor that any of the firm property was sold to Mr. Seabrook, during that period, in payment of his claim. It may be that the stock of merchandise, the four mortgages held by the firm, and all the other assets which the complainant now insists shall be added to the debit side of the account, were applied in reduction of the \$9,188.22 due April 1st, 1856, and it was thus reduced to \$5,831.13. That course, under the circumstances, would have been natural and business-like. To say that it was pursued, would be conjecture, but that is the best foundation which any judgment in this case can have. The remote period at which this investigation must start, the death of Mr. Seabrook, the loss of evidence and the faded condition of all recollection after the lapse of so many years, leave the court without means of ascertaining the truth, and consequently without the ability

Mutual Benefit Life Ins. Co. v. Brown.

to do complete justice. For this reason I am of opinion the complainant must be dismissed.

My judgment on the other ground is also with the defendants. So far as it is possible to deduce any satisfactory conclusion from the material in hand, I am of opinion enough has not been received from the assets of the firm to pay the debt due to Mr. Seabrook. I believe an account stated according to any series of rational conjectures, where resort must be had to conjecture for the want of evidence, will show a balance against the firm. If, in an action for an account, the court is satisfied nothing is due to the complainant from the defendant, no further proceedings will be permitted, but the bill will be dismissed. *Campbell v. Campbell*, 4 Hal. Ch. 738.

The defendants are entitled to a dismissal, with costs.

The complainant has been examined as a witness regardless of the defendant's objection to his competency. His suit is against the defendants in their representative capacity, and the statute, therefore, seals his mouth. His testimony must be cast out.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY

v.

ROBERT P. BROWN and PHEBE C. BROWN.

1. The application of the maxim, that he who asks equity must do equity, is not limited to any particular class of cases, but may be applied whenever it is necessary to the promotion of justice.

2. The opinion of experts in handwriting is evidence of low degree.

3. At common law signing is not necessary to the due execution of a deed, but it is made so by the statute of frauds.

4. But if the grantor's name is written in his presence and by his direction, it is his act, and he will not be permitted, in a court of equity, to repudiate a deed thus executed.

 Mutual Benefit Life Ins. Co. v. Brown.

On final hearing, on bill, answer and proofs.

Mr. Cortlandt Parker, for complainants.

Mr. Joseph Coult, for defendants.

THE VICE-CHANCELLOR.

The defence in this case is forgery. The charge is not made against the mortgage sought to be foreclosed, but against a letter of attorney under which the mortgagor obtained title. The paper alleged to be false is a power of attorney purporting to be made by Robert P. Brown to Israel H. Morehouse, February 21st, 1852, authorizing him to sell the land constituting the mortgaged premises, and convey the same in fee. It purports to have been executed in the presence of a subscribing witness, who, September 15th, 1855, made oath before a master of this court that he saw Robert P. Brown, the person named therein, sign, seal and deliver the same as his voluntary act and deed, and that he (the witness) at the same time signed his name thereto as an attesting witness. Upon this proof, the paper was recorded September 29th, 1855. Under the authority thus conferred, Israel H. Morehouse, in conjunction with Mr. Brown's wife, by deed bearing date February 4th, 1856, con-

NOTE.—The construction given to the statute of frauds, is the same in equity as at law, (*Morison v. Turnour*, 18 Ves. 173, 183; *McComb v. Wright*, 4 Johns. Ch. 659, 666); and such construction must be strict, (*Delventhal v. Jones*, 53 Mo. 460, 463).

Whatever may be the rule elsewhere as to the necessity of a signature to a deed, under the statute of frauds (*Aveline v. Whisson*, 4 Man. & Gr. 801; *Cherry v. Heming*, 4 Exch. 631; *Coch v. Goodman*, 2 Ad. & El. (N. S.) 580; *Armstrong v. Storall*, 26 Miss. 275; *Herbert v. Turner*, 6 Jur. 194; *Vandenbergh v. Spooner*, L. R. (1 Exch.) 316; *Jeffery v. Underwood*, 1 Ark. 108; *Maule v. Weaver*, 7 Pa. St. 329, 332; *Dutch v. Mead*, 4 Jones & Sp. 427, 10 Alb. L. J. 336; *Thomas v. Caldwell*, 50 Ill. 138. See *Brandt on Surety*, § 75; *Browne on Frauds* § 355; 1 *Broom & Had. Com.* 725), there can be no doubt in this respect in New Jersey, under the express requirements of the statute (*Rev.* p. 444, §§ 1, 2).

As to the place of signing (where the statute does not require the name to be subscribed. *Davis v. Shields*, 26 Wend. 341; *People v. Mur-*

Mutual Benefit Life Ins. Co. v. Brown.

veyed the mortgaged premises to one Samuel Morehouse, who, by deed dated April 9th, 1856, reconveyed them to Israel H. Morehouse. The mortgage in suit was executed by Israel H. Morehouse and wife, to the complainants, September 20th, 1856, to secure the payment of a loan of \$2,500 made on the delivery of the mortgage. On February 9th, 1859, Morehouse conveyed the mortgaged premises to Mrs. Brown, subject to the complainants' mortgage, and she continued to hold the title at the time this suit was brought.

The letter of attorney bears date a few days before Mr. Brown left this state for California, to be absent two or three years. He went to California in the hope of improving his pecuniary condition, leaving his family, consisting of a wife and two daughters, the eldest under fourteen, on the premises in question. These premises were then subject to a mortgage, made February 22d, 1851, by Mr. and Mrs. Brown to the Newark Savings Institution, for \$1,400. Mr. Brown remained in California about a year and then went to Australia. While in California he wrote frequently to his wife, and sent her money at different times, amounting in the whole to \$800; but, after leaving there, although he says he wrote several letters, neither his family nor his acquaintances heard anything from him or of him, and for nearly ten years he was generally believed to be dead. He returned to New-

ray, 5 Hill 468; *James v. Patton*, 6 N. Y. 9), it may be in any part of the instrument, provided an intention to bind the party appears. *Smith v. Howell*, 3 Stock. 349, and cases cited; *Adams v. Field*, 21 Vt. 296; *Brink v. Spaulding*, 41 Vt. 96; *Caton v. Caton*, L. R. (1 Ch. Ap.) 137, (2 H. of L.) 127; *McConnell v. Brillhart*, 17 Ill. 354; *Anderson v. Harold*, 10 Ohio 399; *Hubert v. Treherne*, 3 Man. & Gr. 743; *Kieth v. Kerr*, 17 Ind. 284; *Elliott v. Sleeper*, 2 N. H. 525; *Pegauwett Bridge v. Mathes*, 7 N. H. 230; *Zimmerman v. Sale*, 3 Rich. 76. See *Marshall v. Hann*, 2 Harr. 425.

In *Peabody v. Hewett*, 52 Me. 33, it was held that where one jointly with others signs, seals and delivers an instrument supposed to be a perfect deed, but his name appears in no other part thereof, his interest in the premises described in such instrument is not thereby conveyed. See *Frazer v. Ford*, 2 Head 464; *Whiteley v. Stewart*, 63 Mo. 360; *Stone v. Montgomery*, 35 Miss. 83.

As to the mode of signing, it seems well settled, both on principle and authority (notwithstanding the doubts expressed in *Browne on Frauds*,

Mutual Benefit Life Ins. Co. v. Brown.

ark in May, 1864, after an absence of over twelve years. Except \$50, which he says he sent shortly after reaching there, he does not claim, while in Australia, to have attempted to contribute anything to the support of his family.

He now denounces his signature to the letter of attorney, as well as that of the subscribing witness, as spurious. When it is considered that the subscribing witness has already—at a time when he must have had a clear memory whether the transaction of which he spoke ever occurred or not and when, so far as the evidence gives any light as to his situation or position, he was without the slightest temptation to falsehood—declared upon his oath that both signatures are authentic, this charge seems bold almost to recklessness, and, in the absence of very cogent proof, must be regarded as incredible. Morehouse, the person constituted the attorney in fact, was Mrs. Brown's brother. She went to him for aid as soon, after her husband left, as she needed it. Up to December, 1858, the authority conferred by the letter of attorney was used exclusively for the benefit of Mr. Brown's family. If forgery was committed, it would seem to have been, as was aptly remarked by counsel, a pure case of vicarious iniquity. The evidence shows, I think, beyond all doubt, that \$800 of the money loaned by the complainants was applied in payment of the mortgage held by

p. 12, founded on one case in which the court was divided, *Wallace v. McCollough*, 1 Rich. Eq. 426), that a signature by another in the presence and by the direction of the grantor, is a good execution of a deed. Besides the cases cited by the learned vice-chancellor, the following may be referred to:

In *Stevens v. Vancleve*, 4 Wash. C. C. 262, 269, an execution of a will by a testator having his hand guided, at his request, by a third person, was deemed valid; and see *Helshaw v. Langley*, cited in *Benj. on Sales* § 256; *Cozzens's Will*, 61 Pa. St. 196; *Vandruuff v. Rinehart*, 29 Pa. St. 232; *Van Hauswick v. Wiese*, 44 Barb. 494; *Vines v. Clingfost*, 21 Ark. 309; *Riley v. Riley*, 36 Ala. 496; *Robins v. Coryell*, 27 Barb. 556; *Bailey's Case*, 1 Curteis 914; but see *McElwaine's Case*, 3 C. E. Gr. 499; 1 Wms. on Ex'rs, p. 101, *et seq.*

In *Rex v. Longnor*, 4 Barn. & Adol. 647, an indenture of apprenticeship (both the father and the boy being unable to write) was held binding where they desired a third person to write their names opposite two of the seals, and he did so in their presence.

Mutual Benefit Life Ins. Co. v. Brown.

the Newark Savings Institution, and that most of the balance, if not the whole of it, was expended in the construction of a second house on the mortgaged premises. This second house was built for the purpose of enabling Mrs. Brown to rent the house she occupied when her husband left, and thus augment her means of support. She was living in the new house on her husband's return; he took up his abode there, and has lived there ever since. The letter of attorney and the complainants' mortgage were brought to his notice by his wife soon after his return. Seven payments, amounting together to \$642, were made on the mortgage in suit after Mr. Brown's return. They were all made by his wife, with his knowledge, and in part with rents derived from the mortgaged premises. She says that he said it was not right to make them. On the 25th of May, 1866, Mr. and Mrs. Brown filed their bill in this court, alleging that the signature of Mr. Brown to the letter of attorney was a forgery, and praying that it might be so adjudged, and the letter declared to be of no validity; and, also, that two mortgages, executed by Morehouse, in December, 1858, might be set aside. The complainants were not made parties, although they were clearly indispensable to the perfection of the action. No decree touching the validity of the letter could do complete justice, such as a court of equity is bound to do

In *Reinhart v. Miller*, 22 Ga. 402, a marriage settlement was brought to the door of a room where the bride was preparing for the wedding ceremony, and she requested the bearer, in the presence of a witness, to sign it for her. He withdrew to the yard adjoining and signed it there.—*Held*, a good execution. See *Rhode v. Louthain*, 8 Blackf. 413.

In *Kime v. Brooks*, 9 Ired. Law 218, a daughter testified that a servant of H. brought a bond to her father signed by H. and containing a seal for another name, with a request from H. to her father to sign it. Her father, by reason of infirmity, could not write, and directed her to sign it for him; for that purpose he laid the paper on a table, and then went out of the house. She signed his name, as she had often done before, and delivered it to H.'s servant. The father made no objection afterwards.—*Held*, not to be such a signing in his presence as would bind the father.

In *Mackay v. Bloodgood*, 9 Johns. 285, one partner read and approved an arbitration bond and consented that his copartner should execute it.—*Held*, that such execution, in the name of the firm, by the copart-

Mutual Benefit Life Ins. Co. v. Brown.

if it acts at all, which did not bind them. *Story's Eq. Pl.* § 72. The effect of this omission was obviated by admissions. The bill stated that the money secured by the complainants' mortgage had been expended for the benefit of Mr. and Mrs. Brown, on the premises in question; that they had no wish to evade its payment, but thereby recognized it as an equitable lien on the property, and the prayer of the bill declared that they were willing the complainants' debt should stand as an equitable lien on the property. These admissions were made under the advice of counsel. That is now urged as a reason why they should not bind the defendants, but, in my opinion, it must be held to greatly strengthen their force. The advice, in view of the facts, was undeniably wise and judicious, just such as an upright practitioner, simply desirous of using legal remedies for the promotion of justice, would believe it to be his duty to give. Besides, I think it may well be doubted whether an attempt to overthrow the complainants' mortgage in that suit could, under the circumstances, have resulted in unconditional success. Mr. and Mrs. Brown were then in the full enjoyment of the complainants' money. The house in which they lived was built with it, and a debt which they had pledged their home to pay, was paid with it. The complainants had acted cautiously. Before making the loan they had carefully

ner, his partner being in the store at the time, although not in his immediate presence, was good. See, also, *McDonald v. Eggleston*, 26 *Vt.* 154, 156; *McWhorter v. McMahan*, *Clarke's Ch.* 400, 10 *Paige* 386.

In *Jansen v. McCahill*, 22 *Cal.* 563, a married woman requested her daughter to sign her name to a mortgage, which was done in her presence.—*Held*, as valid as if it had been written by herself. See *Videau v. Griffin*, 21 *Cal.* 389.

In *Hudson v. Revett*, 5 *Bing.* 368, a debtor conveyed his property in trust for his creditors, but the amount of one debt, being unknown, was left blank. The next day it was ascertained and filled in by his attorney, in his presence.—*Held*, a good execution of such deed.

In *Williams v. Woods*, 16 *Md.* 220, an entry of a sale of goods made in a blotter by a clerk of defendants' agent who stood by and directed such entry, was considered binding on the purchaser. See *Johnson v. Mulry*, 4 *Roberts* 401; *Graham v. Musson*, 5 *Bing. (N. C.)* 603; *Durrell v. Evans*, 1 *H. & C.* 174, 9 *Jur.* 104.

explored all the sources of information respecting titles provided by law, and, in addition, they had the assurance of Mrs. Brown, so far as she could give it by joining Morehouse in the deed, that the letter of attorney was a genuine instrument. These facts, it seems to me, would have presented a very proper case for the enforcement of the maxim that he who asks equity must do equity. It is undoubtedly true that this rule is more frequently applied in usury cases than any other, yet its domain is universal, and it is the duty of the court to apply it in any case where its application is necessary to the doing of justice. 1 *Story's Eq. Juris.* § 64, and note (2).

The fact that the paper was a nullity, by reason of forgery, would not have rendered the maxim inapplicable, for formerly that was the state, by force of express statutory provision, of every mortgage founded on an usurious contract. Unquestionably, one of the main purposes of the suit just referred to was to confirm the validity of the complainant's lien, and thus avoid the resistance they would make to the relief sought in that suit. Having gained an advantage over their adversaries in the former action by means of a concession, justice and fairness would seem sternly to forbid anything like retraction or repudiation in this suit.

In *Frost v. Deering*, 21 Me. 156, a husband, at his wife's request, signed her name to a deed, several days after his own had been signed, and in her absence. It also appeared that she had subsequently stated several times that he did so at her request.—*Held*, sufficient to bar her dower. See 2 *Scribner on Dower* 276; *Powell v. Monson*, 3 Mas. 347; *Stone v. Montgomery*, 35 Miss. 83; *Linsley v. Brown*, 13 Conn. 192; *Hall v. Redson*, 10 Mich. 21; *Burns v. Lynde*, 6 Allen 305.

In *Bird v. Decker*, 64 Me. 559, an illiterate son conveyed lands to his father, and executed the deed by orally authorizing another person to sign it in his presence, afterwards duly acknowledging it.—*Held*, to be a valid conveyance. See, also, *Wool v. Goodridge*, 6 Cush. 117; *Mallon v. Story*, 2 E. D. Smith 331; *Harris v. Story*, Id. 363.

In *Pierce v. Hakes*, 23 Pa. St. 231, one witness, who was present at the transaction, testified that a married woman executed a deed by a third person taking hold of her hand and signing her name, which deed was then duly acknowledged.—*Held*, to constitute a good signing.

In *Speckels v. Sax*, 1 E. D. Smith 253, a written lease was shown and read to a woman who took a pencil to sign it, but found that her name

Mutual Benefit Life Ins. Co. v. Brown.

But is forgery proved? The record proofs submitted by the complainant establish a perfect *prima facie* case, and put the burden upon the defendants. Mr. Brown swears that his signature to the letter is a forgery. His evidence on this point is very emphatic; if it was trustworthy it would be decisive, but he cannot be credited. His denial of his signature, made not very long ago—the authenticity of which is beyond question—of the fact that he made a mortgage to the Newark Savings Institution in 1851, and of other material facts not susceptible of dispute, show his memory to be so far impaired as to render it useless as a means of ascertaining the truth. A witness who denies, with almost imprecatory solemnity, his own acts in important transactions which he must recollect if he has any memory at all, cannot be believed in anything he affirms. The residue of the testimony on this point consists of the opinion of experts and the papers themselves. Both Morehouse and the subscribing witness are dead. Three of the experts swear they were acquainted with the handwriting of Morehouse, and they believe that the body of the letter, the signature of Mr. Brown and also that of the subscribing witness, are all in the handwriting of Morehouse. Neither of them had any knowledge of the handwriting of Mr. Brown, except what

had been already written by her brother, who had himself signed as surety for the rent. She thereupon delivered the lease, stating that she supposed he had written her name and it was all right.—*Held*, in the absence of fraud, that there was a sufficient execution to bind her.

In *Henderson v. Barbee*, 6 Blackf. 26, one partner, in the presence of the other, sealed a note and, with his consent, subscribed the names of both.—*Held*, to be the deed of both. See, also, *Colly. on Partn.* §§ 414, 478; 1 Am. Lead. Cas. *449; *Lee v. Onstott*, 1 Ark. 206; *Cotten v. Williams*, 1 Fla. 37. So, where one wrote the bond and the other sealed it. *Witter v. McNiel*, 3 Scam. 433; *Potter v. McCoy*, 26 Pa. St. 458.

The incapacity of the party executing a deed or instrument by the hand of another need not be shown (*Baker v. Dening*, 8 Ad. & El. 94); but the signing and authority should be proved by the signer. *McKee v. Myers*, Addis. (Pa.) 31. [See 1 Phil. Evid., note 165, as to this case.] Also, *McMurtry v. Frank*, 4 Mon. 39; *Owen v. Barrow*, 4 Bos. & Pul. 101.

Whether an obligor authorized a third person to sign the obligation for him and in his presence, is a question of fact for the jury. *Hawk-*

Mutual Benefit Life Ins. Co. v. Brown.

they acquired by comparison. A fourth declined to express an opinion, and the fifth said he would not say the signature of the subscribing witness was in the same handwriting as that of the body of the letter, though there was considerable similarity; that his experience had shown that many persons write their signatures differently at different times, the disparity being produced by difference in position, writing materials, or condition of health of the writer, and that he thought many examples could be produced in which it would be found there was quite as much difference between the genuine signatures of the same person as there was between the genuine and spurious signatures of the subscribing witness produced for his inspection. All doubts respecting the competency of the opinion of experts in handwriting, based upon mere comparison, as evidence, have been removed by statute (*Rev.* p. 381, § 19); but it still must be esteemed proof of low degree. Very learned judges have characterized it as much too uncertain, even when only slightly opposed, to be the foundation of a judicial decision. *Gurney v. Langlands*, 5 *Barn. & Ald.* 185; *Doe v. Suckermore*, 5 *Ad. & El.* 751; 1 *Greenl. Ev.* § 80, note (2); *Stark. Ev.* 173, note (e). In this case there is a conflict of opinion; the preponderance is, however, against the integrity of the

ins v. Chace, 19 *Pick.* 502; *Rhode v. Louthain*, 8 *Blackf.* 413; *Videau v. Griffin*, 21 *Cal.* 389; *Tupper v. Foulkes*, 9 *C. B. (N. S.)* 797.

How far a subsequent acknowledgment of a deed before a magistrate, tends to cure informalities in the execution—see *Bird v. Decker*, *Pierce v. Hakes*, *supra*; *Com'rs v. Chase*, 6 *Barb.* 37; *Bartlett v. Drake*, 100 *Mass.* 174; *Ingoltsby v. Juan*, 12 *Cal.* 564; *Pike v. Bacon*, 21 *Me.* 280, 287; *Armstrong v. Stovall*, 26 *Miss.* 275, 282; *Linsley v. Brown*, 13 *Conn.* 192.

Ball v. Dunsterville, 4 *T. R.* 313 (and the same remark applies to *Henderson v. Barbee* and other partnership cases *supra*), often cited in support of the position that a deed is valid if executed by another under the parol authority and in the presence of the grantor, seems distinguishable, because such signing by one partner, even in the absence of his copartners, would, on proof of prior parol authority, bind all of the parties to the instrument (*Gibson v. Warder*, 14 *Wall.* 244; *Cady v. Shepherd*, 11 *Pick.* 400; *Price v. Alexander*, 2 *Greene (Iowa)* 427; *Day v. Lafferty*, 4 *Ark.* 450; *Mackay v. Bloodgood*, 9 *Johns.* 285; *McCart v. Lewis*, 2 *B. Mon.* 267; *Ely v. Hair*, 16 *B. Mon.* 230; *Swan v. Stedman*, 4 *Metc.*

 Mutual Benefit Life Ins. Co. v. Brown.

paper; but on the other side stands the oath of the subscribing witness, and that, in this case, in my judgment, is entitled to great consideration.

But let the accuracy of the major opinion be conceded, still forgery is not proved nor the invalidity of the letter established. If Mr. Brown's signature was written by his direction, and in his presence, it is clear there was no forgery, and I think he ought not to be allowed to repudiate in a court of conscience a paper thus executed while he is in the full enjoyment of the fruits which it brought to him. At common law, signing is not essential to the validity of a deed (1 *Chit. Con.* 4; *Ad. Con.* 19), but is made so by the statute of frauds. (*Rev.* p. 444, § 1.) That requires that the person making a deed of land shall sign it in person, or by an agent thereunto lawfully authorized by writing. But the authorities hold that if the grantor's name is written by the hand of another, in his presence and by his direction, it is his act, and the signature, in point of principle, is as actually his as though he had performed the physical act of making it. *Gardner v. Gardner*, 5 *Cush.* 483; *Irrin v. Thompson*, 4 *Bibb* 295; *Ball v. Dunsterville*, 4 *T. R.* 313; 2 *Greenl. Cruise* 333, § 60; *Story on Agency*, § 51; 2 *Greenl. Ev.* § 295. Mr. Browne, in his treatise on the statute of frauds, seems to dissent from this view. He does not consider *Gardner v. Gardner* as an

(*Mass.*) 548; *Fox v. Norton*, 9 *Mich.* 207; *Wilson v. Hunter*, 14 *Wis.* 683; *Cockroft v. Claffin*, 64 *Barb.* 464; see *Tappan v. Redfield*, 1 *Hal. Ch.* 339); or, on proof of subsequent parol ratification (*Yarborough v. Monday*, 2 *Dev.* 493, 3 *Dev.* 420; *Fleming v. Dunbar*, 2 *Hill (S. C.)* 532; *Herbert v. Hanrick*, 16 *Ala.* 581; *Gunter v. Williams*, 40 *Ala.* 561; *Hawkins v. Hastings Bank*, 1 *Dill.* 462; *Skinner v. Dayton*, 19 *Johns.* 513; *Gram v. Seton*, 1 *Hall* 262; *Smith v. Kerr*, 3 *N. Y.* 144; *Lawrence v. Taylor*, 5 *Hill* 107; *Pettis v. Bloomer*, 21 *How. Pr.* 317; *Darst v. Roth*, 4 *Wash. C. C.* 471; *Holbrook v. Chamberlin*, 116 *Mass.* 155; *Drumright v. Philpot*, 16 *Ga.* 424; *Hayes v. Seachrest*, 13 *Iowa* 455; *Bond v. Aitkin*, 6 *Watts & S.* 165; *Johns v. Battin*, 30 *Pa. St.* 84; *McNutt v. Strayhorn*, 39 *Pa. St.* 269; *Gwin v. Rooker*, 24 *Mo.* 290; *Peine v. Weber*, 47 *Ill.* 41; *Lowery v. Drew*, 18 *Tex.* 786; 1 *Am. Lead. Cas.* *450; *Chit. on Con.* 352; *Turbeville v. Ryan*, 1 *Humph.* 113; *Russell v. Annable*, 109 *Mass.* 72); whereas an individual cannot by parol authorize another to execute a deed in his absence, nor ratify it, by parol, after such execution (*Smith v. Dickinson*, 6 *Humph.* 261; *Hanford v. McNair*, 9 *Wend.* 54; *Blood v. Goodrich*, 9 *Wend.* 69, 12

Mutual Benefit Life Ins. Co. v. Brown.

authority directly on the point, inasmuch as the statute under which it was decided did not, in express terms, require the authority of the agent to be evidenced by writing; and therefore says, when the question arises under a statute containing that provision, a problem of considerable difficulty will be presented. *Browne on Frauds* § 12. A person physically unable or too illiterate to write his name, may sign by making a cross, a straight or a crooked line, a dot, or any other symbol. Simply making a mark by bringing the pen in contact with the paper is sufficient. The right to sign in any of these modes cannot, in principle, depend wholly upon the question of capacity.

I do not believe the legislature intended to give any such extraordinary virtue to the mere physical act of touching a pen to paper as to mean that a deed should be valid if it was done, but invalid if it was not done, though the grantor adopted the signature made for him by a delivery of the deed and an acceptance of the consideration. The essential ingredient of the transaction, in the language of Chief Justice Shaw, is the disposing purpose, an intention, by the act done or directed, to divest himself of title and pass it to the grantee. If this is the purpose of the grantor's mind, the deed is his, though his name be traced by the hand of another.

Any rational hypothesis, fairly deducible from the evidence, which will harmonize it and further the due administration of justice, the court is bound to adopt. There is nothing in the proofs which will justify even a suspicion that the subscribing witness was controlled by corrupt motives in making the oath in proof of the execution of the letter of attorney; nor is there anything, except the opinion of the

Wend. 524; *Newton v. Bronson*, 13 N. Y. 587; *Videau v. Griffin*, 21 Cal. 389; *Despatch Line v. Bellamy Co.*, 12 N. H. 205; *Groce v. Hodges*, 55 Pa. St. 504; although the rule in Massachusetts is otherwise. *McIntyre v. Park*, 11 Gray 102. Compare *Rhode v. Louthain*, 8 Blackf. 413; *Hunter v. Parker*, 7 M. & W. 322; *Frost v. Deering*, 21 Me. 156; *Soames v. Spencer*, 1 Dowl. & R. 32.—REP.

Gibbons v. Potter.

experts and the evidence afforded by the papers themselves, to show that he was inveigled, by any species of deceit, into making the affidavit. The opinions and the papers furnish evidence quite too uncertain, in view of the hypothesis suggested, to be the basis of a judgment against the complainants at this remote period and under the peculiar circumstances of this case.

The defence, in my judgment, is not proved, and the complainants are therefore entitled to a decree.

ALPHEUS D. GIBBONS

v.

HENRY L. POTTER.

1. A suitor who attempts to overcome his own written admission of a payment, can only succeed by the production of proof sufficient to make the truth of his claim clear.

2. A witness who feigns forgetfulness of circumstances collateral to his main story, which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief.

On final hearing, on bill, answers and proofs.

Mr. Thomas S. Shafer and *Mr. William J. Magie*, for complainant.

Mr. J. H. Stone, for defendant.

THE VICE-CHANCELLOR.

This case presents simply a question of fact: Did the defendant make a payment of \$8,000 on the mortgage in suit in August, 1876? The mortgage was given for \$14,600,

Gibbons v. Potter.

being part of the purchase-money of a farm conveyed by the complainant to the defendant, and bears date August 1st, 1872, and provides for the payment of the principal sum as follows: \$4,400 August 1st, 1874; \$3,400 August 1st, 1875; \$3,400 August 1st, 1876, and \$3,400 August 1st, 1877. On the 1st of August, 1876, \$9,300 remained unpaid, being the installment which fell due on that day, and that which would come due August 1st, 1877, and \$2,500 of the installment which had fallen due August 1st, 1875. The defendant says he paid the complainant \$8,300 about the middle of August, 1876. He produces two receipts, both signed by the complainant, in support of his claim. They bear date August 1st, 1876; one is endorsed on the bond, and the other is a separate paper which passed into the possession of the defendant at the time it was made. It is agreed that they were not made on the day they bear date. The proofs show that the parties met at the house of the complainant about the middle of August, 1876, and that the defendant then passed to the complainant three papers: a note of a person by the name of Robinson, for \$250, falling due December 30th, 1876, and which the defendant, and not the drawer, paid; the defendant's own note, payable to the order of the complainant, at four months, for \$307; and the defendant's own check or note, at a short day, for \$83.40. No endorsement was made on the bond at that time, but a loose receipt was given to the defendant. The Robinson note was payable at a Rahway bank, and was paid there by the defendant, January 2d, 1877. On the next day, or the day following, the defendant again went to the house of the complainant, and the receipts in controversy were then made.

The defendant says his payment consisted of over \$8,000 in money, some notes and, he thinks, a small check, but he is unable to give the precise details, while the complainant says not a penny in money was paid, and nothing was delivered to him but the three papers. Deducting the discount, the value of the three papers, on the 1st of August,

Gibbons v. Potter.

1876, was just about sufficient to pay the interest then due, and \$300 of the principal. This, the complainant says, was the sum of principal that it was understood was then paid, and nothing more. The loose receipt, given at the time the papers were passed, is not produced. The defendant says he gave it to the complainant at the time the endorsement was made on the bond, but the complainant denies this, and says the defendant destroyed it at that time. Both the receipts were written by the defendant. The complainant swears that they have been altered since he signed them; that he read them before signing, and they then simply acknowledged a payment of \$300 of principal, and that the word eighty, making the sum eighty-three hundred dollars, has been added since. Such a change, in the receipt taken by the defendant, was easy enough; and in respect to the one endorsed on the bond, and which remained in his possession, the complainant says that was written and signed first, and after he signed it, he observed that the figures denoting its amount had not been put on, and he handed it back to the defendant to have them added; that, while he was in the act of signing the other or duplicate receipt, he saw the defendant using his pen on the bond, but did not see what he was doing, but supposed, of course, he was adding the figures; that, very shortly afterwards, the defendant handed the bond back, folded up, and, without unfolding it or making any examination of it, he put it away. His theory is, that the defendant made the fraudulent alteration while he had the paper for the purpose of adding the figures.

The receipts unquestionably make a strong case for the defendant, and put upon the complainant the burden of showing that the money was not paid, or that the receipts were altered after they were signed. To be successful on either ground, his proofs must be sufficient to produce strong and clear conviction. I think they fully come up to that standard, and show, with almost absolute certainty, that the money was not paid.

In cases of this kind, the conduct of the chief actors in the transaction generally furnishes sufficient evidence of the truth to show at least in what direction to search for it. Few bad men possess such perfect cunning in the art of deceiving as to be able to make their acts accord naturally with their words in concealing their evil purposes. The complainant says he first discovered the receipt on the bond was wrong on the last day of January, 1877; he had not examined it before since the endorsement was made, and he happened to look at it then because a half-year's interest was due the next day. He went at once in pursuit of the defendant; he found him, on the 2d of February, at his own house, and there, in the presence of his wife and son, showed him the bond and told him the receipt was for an untrue amount. He says the defendant admitted the receipt was wrong, and explained the error by saying he must have been thinking, when he wrote it, of the \$83 check. The complainant says he asked for an immediate correction; that the defendant hesitated a short time, and then said his duplicate receipt was in New York; he would prefer to see that first, but he would get it the next day, and call at the complainant's house in the afternoon and make the correction. He did not keep his promise.

This was a very important interview. Its scenes must have made a very deep impression upon the mind of every person present. The defendant, on his first examination, admitted that the complainant at this time claimed there was an error in the receipt, but, on a subsequent examination, he said if he had said so it was a mistake, for it was not until a later interview that such claim was made. But his conduct, I think, furnishes very cogent proof of the truth of his first statement; he at once prepared to make a tender of the unpaid balance of the mortgage, though it had not yet fallen due. As to what transpired at this interview, the complainant's evidence stands not only substantially uncontradicted, but strongly corroborated by the fact that neither the defendant, his wife, nor his son, have

Gibbons v. Potter.

attempted to tell what did occur. All three say they did not see the bond, nor hear the complainant say anything about a mistake; but they stop there; neither attempts to narrate what was said or done. All the way through the case the defendant has preserved absolute silence as to what he said when the complainant first claimed that the receipt admitted the payment of a larger sum than he had paid. The payment of so large an amount was an event neither could forget, nor was it possible for such a transaction to become the subject of confusion or doubt in the mind of either in so short a time. Both knew, the instant the claim of mistake was made, whether it was true or false, and the fact that the defendant does not even pretend that he met it with any sort of denial, leaves him in a position where his conduct must be considered as strongly confirmatory of the truth of the complainant's evidence.

The complainant also says that, after the defendant failed to keep his promise to call on him, he went in pursuit of him again, the next morning, and found him on the street. He says the defendant then stated that he had not got his receipt the day before, but he would get it that day and call in the evening; but he again failed to keep his promise. The next day was Sunday. On Monday the defendant called, in the complainant's absence, and left word he should call at his (the defendant's) house the next day. He says he went early the next morning, when the defendant produced the duplicate receipt, declared that he had paid the money and could prove it; that his son at once cried out that he had seen the money paid, and immediately thereafter the defendant's wife said she had seen her husband start from home with the money to make the payment; that thereupon the defendant, and before he (the complainant) had had an opportunity to utter a word, tendered him \$1,035 in payment of the balance of the mortgage, and then said that he had already paid all the farm was worth; its value had been misrepresented to him; and that, if the complainant would refund what he had paid, he

Gibbons v. Potter.

would reconvey the farm. Up to this time, the complainant says he had had no chance to speak, but he now said he could not entertain any proposition of compromise until the mistake was corrected. He says the defendant then advised him not to act hastily, for, if he did, he would only make food for the lawyers. He then left, and on the same day directed this suit to be brought.

The defendant admits the tender; indeed, he sets it up in his answer; but he does not tell what induced him to make it, nor give any of the circumstances leading to it. So far as his evidence gives any light, it was unprovoked and without motive. He says, when the complainant first called, in February, he merely came for his interest; no bond was shown, and nothing was said about a mistake; he says that that subject was first mentioned in a subsequent interview, but he does not say that there was any dispute or disagreement then, nor does he pretend that he denied the complainant's claim. If it was false, the simple impudence of making it would, it seems to me, have appeared so outrageous to the defendant as to have provoked him to strong denial and bitter denunciation. No man with sufficient self-love to protect himself or his property, would permit a claim of this kind to be made against him, being fully conscious of its utter falsity, without instantly denying it and sternly rebuking the effrontery of the person making it. Silence, under such circumstances, can be interpreted in but one way.

The defendant's story is clearly marked by dissimulation throughout. He admits the complainant came to his house when the tender was made, at his request, but he affects to be unable to remember what he said when he made the request. He says: "I may have told him I had some money for him, or I would have something there for him, or I don't know but what he wanted to see the receipt; it is possible I may have told him, if he came, he could see the receipt." Such confusion of recollection was impossible to a man who was conscious he was resisting an unjust pretension founded

Gibbons v. Potter.

on an impudent falsehood. Why, if the receipt was true there would have been no reluctance in showing it; it would have been the very first thing produced to confront the complainant, and he would have been challenged at once to gainsay what it asserted. The defendant's conduct, as portrayed by himself, I think, is a powerful witness against the truth of his story.

An effort has been made to support the defendant's evidence by attempting to show that, at the time the alleged payment was made, he had sufficient money to make it. He says he derived it from the sale of certain United States coupon bonds which he held at the time of his purchase of the complainant, and which he continued to hold afterwards, although most of his real estate was constantly under mortgage. His ignorance of how he got the bonds, and of what they consisted, is as profound as it could have been if he had never owned them at all. He says he obtained them seven or eight years ago, but he cannot remember how many there were, nor of what series they were, nor the sum total of their par value; but he believes it was *about* \$7,000. He does not remember of whom they were purchased, nor at what place (except somewhere in the city of New York), nor who bought them, nor what was given in exchange for them, nor how they were paid for; nor is he certain whether the interest fell due quarterly or semi-annually, though he collected it for seven or eight years. Such inexplicable ignorance is, in my view, an unmistakable badge of falsehood. A witness who feigns forgetfulness of the circumstances collateral to his main story, and which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief. It is barely possible the defendant sold some federal bonds about the time he alleges he made this payment, but the evidence furnished by his own conduct in disproof of the payment is so thoroughly conclusive that, even if that fact could be considered fully proved, his story would still be incapable of belief.

Claflin v. Mess.

The evidence of the defendant's wife is swept away by force of its own evidence of untrustworthiness. It is painfully manifest that she was controlled, in what she said, by an anxious zeal for her husband's cause, rather than by her recollection or knowledge.

The statement of the defendant's son, that he was present and saw the money paid, is opposed by so strong an array of counter-proof that, notwithstanding the natural inclination of the mind to give credit to the testimony of children, my judgment almost involuntarily rejects his evidence. I cannot believe that his statements are corruptly false, but I think it is highly probable that his memory, under the artful and positive statements of his father, has been so wrought upon as to have unconsciously substituted the occurrences of a prior visit for those of the last.

There are many other circumstances pointing in the same direction. I do not deem it necessary to refer to them further than to say that, with those already mentioned, they leave no doubt in my mind that the payment of \$8,000 claimed was not made, and that the receipts to that extent are false.

The last installment of the mortgage having fallen due during the pendency of this suit, the complainant is entitled to a decree for \$9,000, with interest from August 1st, 1876. I will so advise.

AARON CLAFLIN

v.

PHILIP MESS and others.

1. As to debts existing at the time a voluntary conveyance is made, the law raises a conclusive presumption of fraud, but a subsequent creditor can only impeach such a conveyance by showing fraud in fact.

2. A subsequent creditor may avoid a voluntary deed on the ground that it was made to defraud existing creditors, but, in order to do so,

Claffin v. Mess.

he must show debts still outstanding which existed when the deed alleged to be fraudulent was made.

3. Payment by a grantor of all his debts existing at the time he makes a voluntary conveyance, repels the idea that he thereby intended to defraud his creditors.

On final hearing, on bill, answer and proofs.

Mr. S. H. Jones and *Mr. John R. Emery*, for complainant.

Mr. Carl Lentz and *Mr. S. H. Pennington*, for defendants.

THE VICE-CHANCELLOR.

This suit is brought by a judgment creditor to set aside certain conveyances alleged to have been made in fraud of creditors. The title sought to be avoided was made October 4th, 1870, and was put on record January 16th, 1871. No dealings took place between the judgment debtor and the complainant until May 26th, 1871, and the debt on which the complainant's judgment is founded was not incurred until 1873.

In respect to debts existing at the time a voluntary settlement or conveyance is made, the law raises a conclusive presumption of fraud, and no circumstances can be shown which will repel that presumption. It is a sound principle of law, as well as of morals, that a man must be just before he is generous. But there is no such presumption in respect to subsequent debts, and a creditor whose debt is incurred subsequent to the making of a voluntary deed, in order to impeach it, must show fraud in fact. *Cook v. Johnson*, 1 *Beas.* 54; *Belford v. Crane*, 1 *C. E. Gr.* 271; *Ridgeway v. Underwood*, 4 *Wash. C. C.* 137; *Reade v. Livingstone*, 3 *Johns. Ch.* 481. Actual fraud may be established in the same way and by the same means that any other fact may be proved. It may be considered proved when it appears that, after deducting the property which is the subject of the gift, the grantor has not retained sufficient available assets for the pay-

Claflin v. Mess.

ment of his debts (*Freeman v. Pope*, L. R. (5 Ch. Ap.) 544) and it may also be inferred in case the grantor retains sufficient property to pay his debts, but does not actually pay them, but applies his property to some other use (*Spirett v. Willows*, 3 DeG. J. & S. 302); and so, too, a fraudulent purpose will be regarded as manifest where a grantor secretly makes a voluntary deed with a view to future indebtedness, and with a design of so placing his property that he may have the benefit of it in getting credit, but of having it beyond the reach of his creditors in case his business is unsuccessful. *Cramer v. Reford*, 2 C. E. Gr. 383.

A subsequent creditor may also impeach a voluntary deed, simply on the ground that it was made with intent to defraud existing creditors. 1 *Am. Lead. Cas.* 40; 1 *Story's Eq. Juris.* § 361; *King v. Wilcox*, 11 *Paige* 594. But, in such a case, in order to establish a good title to relief, he must show that, at the time of the commencement of his suit, there were debts still outstanding which the grantor owed at the time he made the deed, otherwise no foundation is laid for avoiding it as a fraud upon antecedent creditors, for if the grantor has paid all his debts incurred prior to the conveyance, that fact fully repels all idea of fraud as to them. *Hunt on Fraud. Con.* 52; 1 *Am. Lead. Cas.* 41; *Spirett v. Willows*, 3 DeG. J. & S. 292; *Freeman v. Pope*, L. R. (9 *Eq.*) 205; *S. C.*, L. R. (5 Ch. Ap.) 536; *Lush v. Wilkinson*, 5 *Ves.* 387; *Kidney v. Consomaher*, 12 *Ves.* 156. The complete dominion which the law gives every man over his property, allows him to do with it as he pleases while he is free from debt, or so long as he pays his debts.

For present purposes it will be assumed, notwithstanding some evidence to the contrary, that the deed in controversy is without sufficient consideration to support it against creditors whose debts existed at the time it was made. The complainant's rights as a creditor arose long after the title he seeks to avoid became a matter of public record. The evidence will not support a finding that the deed in question was made with intent to defraud future creditors; on the

Claffin v. Mess.

contrary, it is shown quite clearly that the grantor discharged all his debts for more than a year after the deed was made, with quite as much promptness as most persons engaged in trade. It is not shown that a single debt which existed at the date of the conveyance, was still outstanding when this suit was commenced. The complainant attempted to show that such a debt still existed, but his effort resulted in proving that the particular debt he had in mind had been fully paid in less than a year after the deed was made. The evidence wholly fails to show that, at the time this action was brought, there was a single debt or liability of the defendant outstanding or undischarged which existed at the date of the deed. There were, therefore, when the complainant sued, no antecedent creditors, nor creditor, whose equity he could invoke, or whose wrongs he could display as a foundation for relief personal to himself.

The fact is proved beyond dispute—indeed, scarcely any attempt was made to deny it—that the defendant, a year or more after he made the conveyance, repeatedly represented, to persons of whom he desired to obtain credit, that he was still the owner of the property. His conduct in this respect was not only fraudulent, but criminal, and he ought to have been made to suffer the consequences of his false pretences. But the property was then lawfully vested in another, whose title had been notified to all the world, by an open, public record, for a year or more, and no representation that the defendant could make, which was neither countenanced by nor known to the owner, could affect the title.

In my view, the complainant has failed to make a case which entitles him to the relief he asks; his bill must therefore be dismissed, with costs.

Black v. Black.

CARRIE E. BLACK, by her next friend,

v.

CLAYTON A. BLACK.

1. A gift by a wife to her husband is good, provided it be voluntary and not the result of his craft or power.

2. When a husband receives money belonging to his wife, the law presumes he receives it for her use, and she may recover on the strength of this presumption, unless he produces proof to rebut it.

3. A wife's money, expended by herself, or under her direction, on her husband's land, or in any other way for his use and benefit, in the absence of an agreement to repay, will be regarded as a gift.

4. A gift by a wife to her husband may be proved by circumstances.

5. Where a wife expends her money on the lands of her husband, in improving and adorning his home, equity will imply, independent of anything in the nature of a contract or promise, that she did so pursuant to an understanding that she was to be permitted to enjoy the benefits flowing from her expenditure, and if he wrongfully drives her from his house, equity will give her relief.

6. A wife must live with her husband, and make his home hers, and give him her services, unless she can show that he has done something which relieves her from her duty to him.

7. To justify a decree of separation, actual physical violence need not be proved, but it must be shown that there is reasonable ground to believe that, if the husband is allowed to retain his power over his wife, and she is compelled to remain subject to him, her life or health will be endangered.

8. Evidence must be weighed according to the means and opportunities of knowledge of the witnesses of the facts whereof they testify.

9. A wife who causelessly deserts her husband is not entitled to the aid of a court of equity in getting possession of such chattels as she has contributed to the furnishing and adornment of her husband's house.

10. Equity will not lend its aid to the causeless disruption of family relations, or countenance unjustifiable disregard of the obligations of the marriage contract.

On final hearing, on bill, answer and proofs.

Black v. Black.

Mr. S. D. Dillaye, for complainant.

Mr. G. S. Cannon and *Mr. James Wilson*, for defendant.

THE VICE-CHANCELLOR.

This is a suit by a wife against her husband, to establish certain property rights. It is purely a property suit. She asks neither an absolute nor limited divorce, nor that her right to be supported shall be assured to her by the decree of this court; but simply that her legal right to certain chattels and debts, and her equitable right to be compensated for the loss of certain rights and privileges belonging to her as a wife, and of which she has been wrongfully deprived, shall be vindicated and enforced. She grounds her action on four distinct claims: First, for money expended by her in erecting buildings on the defendant's land; second, for certain chattels belonging to her which are in her husband's possession and use, and which he refuses to surrender to her; third, for money belonging to her, which the defendant has appropriated to his own use, contrary to her will; and, fourth, for money lent by her to him. The money value of her several claims, according to her estimate, is over \$35,000.

The parties were married in November, 1859, in the city of Philadelphia, where the complainant then resided with her parents, and soon thereafter she came to live with her husband, on his farm in Burlington county. They continued to live together there until the 28th day of October, 1874, when, the complainant says, "she was constrained, by her husband's outrageous conduct and long-continued ill-treatment and cruelty, culminating in infamous accusations, to leave his house and separate herself forever from him." Three children were born unto them, the eldest now being about eighteen years of age and the youngest thirteen. The complainant's father, who was a gentleman of large wealth, died in July, 1872, leaving a will by which he gave her \$50,000 absolutely, and also the income for her life of over \$200,000 more. By the death of defendant's father, which

Black v. Black.

also occurred in July, 1872, he acquired an estate which the complainant, in her bill, estimates at about \$50,000. It is not disputed that the complainant, soon after the death of her father, expended of her own moneys, in rebuilding and beautifying the dwelling-house on her husband's farm and in erecting a new stable, over \$20,000, and that she subsequently purchased many costly articles of household furniture and placed them in the house, and one or two carriages and other articles of luxury, and brought them upon the farm. Her expenditures, both on the buildings and for other purposes, were much more extravagant than the defendant would have made or his means warranted. She says, in her bill, she made them to furnish a home for herself, her husband and her children for life, and in her testimony she twice declares her purpose in making them was to provide a home for herself and her children. The proof shows, very clearly, that the project of rebuilding the house originated with her even before her father's death, and that she set about carrying it out soon after she came into possession of her share of his wealth. Her husband was quite content to continue to live in the old house. It was natural he should be. It was a large, substantial, well-preserved structure, quite equal, if not superior, to the best farm-houses in that part of the state; it was the place of his birth, his home, and had been the home of his father and his mother. It was natural that a man reared upon a farm, of plain tastes and thrifty habits, and with the strong attachment to the home of his youth common to our nature, should regard any project looking towards the demolition of the old house as little short of a wasteful desecration. The reconstruction of the house was undertaken by the complainant with the distinct understanding that the defendant would contribute nothing, and that she must pay the whole cost. She says it was agreed, before the work was commenced, that she was to pay for all of it, and she admits that \$4,000 of the money she used she borrowed of the defendant, and the evidence shows that she returned a security, in payment of this loan,

Black v. Black.

after she left him. It is not pretended that her outlay was made under a promise, or even in expectation, of repayment, but, on the contrary, it clearly appears she had no such expectation or desire. She wanted to live in a house which, in its costs and luxurious appointments, should correspond with her fortune, and she obviously spent her money to gratify that desire, and without the least expectation or wish of creating a liability against her husband. Nor did he suppose, in permitting her to gratify her pride, that he was incurring a liability which might sweep away his whole inheritance.

Stripped of all mere rhetorical exaggeration or aggravation, the equity presented by the bill under the first head may be thus summarized: The complainant, believing that her husband would treat her, during their joint lives, with the kindness and affection which a faithful wife has a right to receive from her husband, has expended a large sum of money on her husband's land, with his approbation, in making a beautiful and attractive home for their joint occupation and enjoyment; but he, after securing the benefit of her large outlay, has, in flagrant violation of her conjugal rights, by cruel and brutal treatment, driven her from his house and compelled her to seek safety by separating herself from him, and has thus wantonly deprived her of all the pleasure and happiness which she made her outlay to secure. It is clear, I think, so long as she continued to live with her husband and to participate in the enjoyment of the luxury and splendor her wealth had brought about them, she was not in a position to set up any claim against him. She was then receiving all she desired to gain by her outlay. She gave her money to purchase a home, not for herself alone, but for her husband and her children, and while she continued a member of his family, and received the consideration due to her as a wife and a mother, she was in the full enjoyment of the full measure of her rights. Neither in justice or morals could she ask anything more. Her expenditures were a gift to her husband. She voluntarily incorporated

Black v. Black.

her property into his, so that hers lost its distinctive character and individuality, and became an indissoluble part of his. She sunk or merged hers into his, and thereby made it his. Her purpose is seen in her acts, and they speak as plainly and as forcibly as any words she could have spoken or written.

There can be no doubt that a wife may give a part, or the whole, of her separate estate to her husband, and thus invest him with a perfect title, but the courts, in consequence of his great influence over her, always look upon such transactions with watchfulness, and require the husband, when he sets up a title founded on a gift from his wife, to show, by full proof, that her act was free and voluntary, and not the result of his craft or power. *Clancy on Mar. Wom.* 347.

When a husband receives money belonging to his wife, the law presumes he receives it for her use, and if he denies that he is liable, the mere fact that he received it casts upon him the burden of showing that he has appropriated it according to her direction, or that she gave it to him. This is the rule in respect to the *corpus* or principal; a different rule prevails as to interest or income. If he receives interest or income and spends it with her knowledge and without objection, a gift will be presumed from her acquiescence. *Horner v. Webster*, 4 Vr. 406; *Hurney v. Phillips*, 50 Pa. St. 328; *Clancy on Mar. Wom.* 352. Money received by a husband from his wife, and expended by him, under her direction, on his land, in improving the home of the family, cannot be recovered by the wife. Her direction to expend it on his property constitutes a gift to him, and cuts off all right, either legal or equitable, to reclaim the money or demand an account. *Johnston v. Johnston's Adm'r*, 31 Pa. St. 450. An appropriation by a wife, herself, of her separate property to the use and benefit of her husband, in the absence of an agreement to repay, or any circumstances from which such an agreement can be inferred, will not create the relation of debtor and creditor nor render the husband liable to account. *Edelin v. Edelin*, 11 Md. 420. Though no words of gift be

Black v. Black.

spoken, a gift by a wife to her husband may be shown by the very nature of the transaction, or appear from the attending circumstances. *Hanford v. Bockee*, 5 C. E. Gr. 106. If a wife should voluntarily accept a bond, payable to her husband, for her share of her father's estate, and then pass it to him, though she did not utter a word indicating her purpose, the circumstances would most unequivocally show a gift. *Vreeland v. Vreeland's Adm'r*, 1 C. E. Gr. 521. The court will not, in transactions between husband and wife, infer an equitable *assumpsit* contrary to their manifest understanding. *Clinton v. Hooper*, 1 Ves. 188.

But a decision which regards the complainant's expenditures as a gift, does not, in my judgment, settle the question of the defendant's liability. They were made with his consent; he could have prevented their being made if he had willed to do so. He knew the motives and purposes which controlled the complainant, and what were her hopes and expectations. His house was her home; she had a right to dwell there and make it the scene of her greatest usefulness, honor and happiness. He knew that her object was to make his home beautiful and attractive for their joint enjoyment, and he accepted her gift on a well-understood condition that he would accord to her the full measure of her rights and privileges as his wife. The intimacy and union of their relation would necessarily give rise to such an understanding. She had a right to believe, independent of anything in the nature of a contract or promise, that she would always be permitted freely to enjoy with him all the benefits flowing from any expenditure she made to increase the comfort and luxury of his home. He has no right to defeat or disappoint these expectations; and hence, if it be true that he has causelessly driven her from his house and compelled her to seek safety in flight, I think his conduct exhibits a case of grievous wrong which calls loudly for redress, and which this court, in the exercise of its undoubted power, is bound to give.

Black v. Black.

The question, then, presented by this branch of the case, is this: Was the complainant justified in separating herself from her husband? The justification she offers is cruelty. She must show a case of extreme cruelty such as would entitle her to a decree of separation. The courts can know no middle ground—a wife must live with her husband, make his home hers, and give him her society and services, unless she can show reasons, valid in law, relieving her from her duty to him. To justify a divorce *a mensa et thoro*, actual physical violence need not be proved, but such conduct, by the husband, must be shown as will justify the court in believing that, if he is allowed to retain his power over his wife and she is compelled to remain subject to him, her life or her health will be endangered, or that he will render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife. *Close v. Close*, 10 C. E. Gr. 529; *English v. English*, 12 C. E. Gr. 585. Slight violence by a husband who has evinced a hatred, almost diabolical, against his wife, in attempting to blast her reputation by fabricating a charge of adultery against her, has been deemed sufficient. *Graecen v. Graecen*, 1 Gr. Ch. 459; *Thomas v. Thomas*, 5 C. E. Gr. 97. Any husband whose sense of decency and justice is so completely destroyed as to be able, deliberately, to set on foot a scheme to fasten upon his wife a false charge of adultery, is, in my estimation, capable of doing anything a cruel heart can desire or a brutal mind invent, and any woman whose life must be spent in the seclusion of his home, and whose person is subject to his power, occupies a position of such constant and extreme danger as to have a right to the protection of the law whenever she demands it.

The proof in support of the charge of cruelty, comes from the mouth of the complainant alone, and is of the most meagre character. She says she left because her husband abused and ill-treated her; that his ill-treatment generally consisted in the use of coarse and profane language, and that on two occasions he struck her. The blows are

Black v. Black.

strongly denied by the defendant. A person whom the complainant says was present when one of them was given, and saw it, swears that he saw nothing of the kind, and that, although he was frequently with the complainant, and conversed with her familiarly, she never uttered a word of complaint against her husband. On the part of the defendant, the servants of the family and several persons who lived on terms of social intimacy with these unfortunate people, have been examined, and they uniformly testify that they never saw anything approaching cruelty, or even unkindness, in the conduct of the defendant towards the complainant, and, with a single exception, they also say they never heard her make any complaint against her husband. The family physician, however, says it was quite a common thing for the complainant to complain of her husband; that she never made any distinct charge against him, except that he used abusive language, but what it was, or why she denominated it abusive, she did not explain. The defendant admits that he has frequently expostulated with her, in very strong terms, against what he thought were gross improprieties of conduct. Whether what he said by way of remonstrance she esteemed abusive, or he actually hurled at her vile epithets, which she could not hear from his lips without believing that his heart was turned against her, or he merely reproved her, with becoming gentleness, for some frivolous fault, her testimony neither tells nor shows. As the case now stands, her judgment as to what constitutes cruelty by the use of abusive language, must be accepted as conclusive, or the charge of cruelty, so far as it rests upon her evidence, must be held not proved. It is needless to say, her judgment cannot be accepted.

But the most weighty evidence on this point, in the opinion of the counsel of the complainant, remains to be considered. It is a letter, alleged to have been written by the defendant to his wife, and sent to one of her male acquaintances, and by him given to the complainant. It is not necessary to state its contents. It is enough to say it is

Black v. Black.

revoltingly obscene, and could only have proceeded from a very corrupt and filthy mind. Nothing proceeding from the heart of a husband, simply in the form of words, could be more cruelly brutal to a refined and virtuous wife. If the defendant wrote it, and the complainant left him in consequence of the wounds and anguish it produced, I am not prepared to say she was not fully justified. But it is certain she did not. She did not leave under sudden provocation, but pursuant to a purpose long cherished and frequently expressed. She does not pretend that the letter provoked the separation; in fact, it is quite certain that, at the time she left him, she had neither seen nor heard of it. Neither before, nor at the time she left, did she ever speak of the letter to the defendant, or to any other person, and on the morning when she left she asked the defendant to kiss her, and permitted him to do so. If she was not wholly insensible to emotions of scorn and indignation, she would never have submitted to the indignity of a kiss from the man whom she believed guilty of such an unmanly attempt to insult and humiliate her. Nor do I believe the defendant wrote the letter. He swears he did not. The stigma of its authorship should not be fastened upon him, except upon full proof such as produces clear conviction. There is nothing in his life or conduct, as portrayed by the evidence, which will for one moment justify a suspicion that he was capable of so dastardly an outrage upon any woman, much less can it be believed that he would commit it upon the woman who is the mother of his children, and whose name is inseparably linked with his. Five experts, after careful comparison of the letter whose authorship is on trial, with writings admitted to have been written by the defendant, have pronounced opinions against the defendant. They had no previous knowledge of his handwriting. Two persons well acquainted with his handwriting have expressed opposite opinions, while the complainant, who is, of course, very familiar with his handwriting, says she believes he wrote it. There is, unquestionably, a strong resemblance, both in

Black v. Black.

general appearance and in certain individual characteristics, between the true and the disputed writings, but this is true of every well-executed counterfeit. The opinion of experts, based on comparison alone, is evidence of low degree, and has been regarded by eminent judges much too uncertain, even when only slightly opposed, to afford a safe foundation for a judicial decision. *Gurney v. Langlands*, 5 Barn. & Ald. 185; *Doe v. Suckermore*, 5 Ad. & El. 751; 1 Greenl. Ev. § 580, note (2); *Stark. Ev.* 173, note (c). Evidence must be weighed according to the means and opportunities of knowledge of the witnesses of the facts whereof they testify. When the defendant swears he did not write this letter, he speaks concerning a fact of which his knowledge is more perfect than that of any other witness, or of all the others. If his bearing in this case has been that of an honest witness, and his testimony as a whole seems to be reasonable, probable and truthful, and if, notwithstanding the strong bias of his deep interest, he has appeared willing to tell the whole truth, whether it helped or hurt him, his evidence must, in virtue of its intrinsic force, outweigh any amount of counter-proof consisting of opinion merely. I think his evidence is entitled to that degree of weight in this case. In my judgment, the complainant's separation from her husband was causeless; it was in fact a wrongful desertion. She must therefore be held to have voluntarily and causelessly deprived herself of the rights and privileges for which she is now seeking compensation. Her first claim must therefore be denied.

This conclusion practically disposes of her second claim. She asks a decree compelling her husband to surrender into her possession certain chattels which she has contributed to the general stock used at his home for the use and enjoyment of the family, because he has wrongfully driven her from his home. A case thus made up, combining strict legal right with an unconscionable violation of conjugal duty, would undoubtedly give an indisputable right to redress. But she has no such case; she is the person who is in the wrong,

Black v. Black.

who has been unfaithful to conjugal duty, and upon whose head rests the shame of destroying a home. Her case stands on her legal right alone. She has that, but it is all.

In my view the defendant has failed to show a title by gift. It has already been decided in this very case (11 *C. E. Gr.* 296) that a bare legal right, existing in the hands of a faithless wife, who has causelessly deserted her husband, is not sufficient to induce this court to put its power in motion to help her. The answer originally filed in this case did not deny the averments of the bill as to the complainant's title to a part of the chattels now claimed, and thereupon a motion was made on her behalf for an order directing their surrender. In deciding that application the chancellor said: "This motion must necessarily be based on the broad ground that a married woman is, without regard to circumstances, entitled to the aid of equity to obtain possession of her property when it is withheld from her by her husband; and, further, that if she chooses to abandon her husband's house, though she may be actuated by caprice merely, or even by a worse motive, she has, by virtue of her legal right alone, a claim upon a court of equity to its aid in obtaining possession of that property, even though it be household furniture which, up to the time of her departure, was in the joint use of her husband and herself in their household, and is still in his possession, in the use of the family. A decent regard for the interests of society would forbid the court from entertaining such a proposition. Equity will not lend its aid to the causeless disruption of family relations, or countenance the unjustifiable disregard of the obligations of the marriage contract. They, therefore, who come into this court for relief in such cases, must not only come with clean hands, but must show a reason valid in conscience, as well as a legal right, for the assistance which they seek." These views command my hearty assent. They rest on obvious considerations of justice and sound policy. It was long ago declared that a wife who deserts her husband to enjoy the society of her paramour, would, on account of her miscon-

Black v. Black.

duct, be refused the aid of a court of equity against her husband, in respect to her separate estate, which, under other circumstances, she would have a right to claim. *Lee v. Lee*, 2 *Dick.* 806; *Clancy on Mar. Wom.* 354. If the complainant's legal right is sufficient, notwithstanding her desertion, to entitle her to the aid of this court, she would, in legal theory at least, upon the same ground, be entitled to the same aid, even if she was living in a state of open adultery.

In refusing to aid the complainant, no question of legal right is determined. On the contrary, her legal right is admitted. She may, perhaps, have such complete dominion over the chattels in controversy as to be able to invest her vendee with a title which her husband cannot successfully resist in a court of law. *Houston v. Clark*, 50 *N. H.* 482; *Jones v. Jones*, 19 *Iowa* 242. But she is repulsed simply because her desire to sue, if not her right of action, flows directly from her own wrongful act. She wants her husband to give up the property which she has contributed to their home, because she has deserted him. Because she has taken herself away, she wants to take her property also. Her suit is the sequence of her desertion; if there had been no desertion, there would have been no suit. She asks the court to help in her wrong. Such a suitor, with such a case, has no right, in my judgment, to the aid of this court.

The third claim, which is a demand for money alleged to have been wrongfully appropriated by her husband, stands on an entirely different footing. If it is true that he has appropriated to his own use moneys which she gave him to deposit in bank to her credit, or if he has refused to pay over to her moneys which he has received for her use, she is entitled to relief. She never consented that he should have the use or enjoyment of such moneys, and, if he has kept them, or used them contrary to her express direction, his conduct was both inequitable and dishonest. But the evidence totally fails to establish the truth of this claim; in truth, it has so scanty a support in the proofs that, in the very elaborate and zealous argument pressed upon my

Black v. Black.

attention by the counsel of the complainant, it received only a very curt and *nonchalant* mention.

The remaining claim, that for borrowed money, I think must be sustained. It is evidenced by three promissory notes. The defence interposed to it is, in my view, without substance or merit. The defendant admits that he borrowed the money, and that he has not paid it, but says, about two weeks before the complainant left him, she and he had a settlement; that, on its conclusion, she asked him for \$30, which he refused to give her; that she then said he would not be bothered with her much longer; that he then said that he wanted her to remember she had certain obligations of his, to which she replied at once, she would return them to him; and that thereupon he wrote, on an old letter envelope, a receipt or release whereby she renounced and gave up all claims she held against him, and requested her to sign it. She at first refused, saying she had not time (she was ready to go to the depot to take a train), but, upon his repeating his request, saying he would like her to sign it, she stepped to the table and signed it.

So far as the evidence gives us any light, her act was without reason or motive, a mere rash or foolish freak; she had already finally determined to leave her husband, and he knew it; there had been no previous talk or negotiation upon the subject, nor, so far as appears, had she ever thought of it before. All we know is, that he reminds her that she holds certain obligations against him; she at once says she will return them, and, without giving her the slightest opportunity to retreat, or even to get a clear comprehension of her act, he attempts to fasten her by a very broad, written surrender. His urgency and her precipitancy, and the utter absence of anything like a sensible motive or a reasonable consideration for her act, I think must leave it, in judicial estimation, without the slightest force or efficacy. The complainant is entitled to a decree for the amount due on the three notes given by the defendant to her.

Black v. Black.

A decree in conformity with the foregoing views will be advised. Neither party is entitled to costs. When the character of the complainant's claims, and the motives which prompted her to prefer them by suit, are considered, it is obvious that she is in no plight to ask to be indemnified against the costs of the litigation.

CLAYTON A. BLACK

v.

CARRIE E. BLACK.

1. A wife will never suffer her person to be debauched until her affections are corrupted.

2. To prove adultery by circumstances, a criminal desire and an opportunity to gratify it, must be shown. Where these both concur, guilt is presumed.

3. Criminal desires may be inferred from strong expressions of attachment, stolen interviews and a clandestine correspondence.

On final hearing, on bill, answer and proofs.

Mr. G. S. Cannon and *Mr. James Wilson*, for complainant.

Mr. S. D. Dillaye, for defendant.

THE VICE-CHANCELLOR.

This is a suit for divorce for adultery. If the evidence can be believed, the fact is established beyond all doubt. But a single act need be proved. Many have been shown in this case, by both direct and circumstantial evidence. I shall not enter into details; to do so, would serve no useful purpose.

Black v. Black.

But a single question need be considered: Can the evidence given in support of any one of the charges be believed? A guilty love generally precedes adultery. A wife never commits it until after she is depraved in mind and heart. Her affections must be debauched before she will allow her person to be. In cases of this class, where infidelity is charged against a wife, it is always important to inquire whether the evidence shows she has so far suffered herself to be alienated from her husband as to allow a criminal love or desire for another man to enter her heart. If such a passion has found a dwelling there, proof which would otherwise be scarcely sufficient to raise a passing cloud of suspicion, will possess a most convincing force. A guilty attachment is shown conclusively in this case. Four of the defendant's letters to one of her illicit lovers, are in evidence. Their authenticity is undisputed. They present a sad picture of moral degradation. They accuse her of lascivious love, of stolen interviews and clandestine correspondence. In one of them, she says:

"Oh, darling! if I could only have you here to-night, if only for a few minutes, I would feel so much happier. I have the blues, and can you wonder at it? Only think how long it has been since I have had any time at all with you; and are the prospects for the future any better? It does not look so to me. But one thing you can rest assured of, my dearest—the separation does not lessen my love for you, but strengthens it! Every day of my life, I love you better; so do not get discouraged and lose your faith, for our time must come, sooner or later. This hope is all that keeps me up. * * * I must stop; I am almost asleep. I wish I could kiss you good-night."

In another, she says:

"I wish I could see you and have a nice long talk with you. I would prize such a privilege beyond expression. Your dear letter was a great comfort to me. I read it many, many times, and then was compelled to consign it to the flames, which I did not do until just before my return home. * * * I cannot write you much to-day—not but what I would like to, and could write all the afternoon, but I have to take chances, which are almost up. I have to go to Philadelphia, in the morning; so that knocks us again. When will our time

Black v. Black.

come? I am getting very much discouraged. * * * Good-bye, my darling, do not forget me, and keep in good cheer. Our time must and will come, sooner or later."

And in a third, she thus piteously and impatiently bewails her situation, because she is restrained, by duty and decency, from the unbridled gratification of her lustful desires :

"Oh, darling! you don't know how I feel. Every day of my life, I love you better; and every day my future looks darker and harder to bear. Why is it that I have to suffer so? What have I done to merit such punishment? If I could but have you, and live and be with you as I would like, I would willingly sacrifice every other pleasure. Will the time ever come that I can? I hope so."

A wife who can give utterance to such sentiments and desires to a man not her husband, needs only a slight opportunity to complete her degradation. In mind and heart, she is already thoroughly defiled, and all she needs to complete her dishonor, is an opportunity to surrender her body to the lustful embrace of a paramour. It is clearly shown that the defendant has enjoyed frequent opportunities to satiate her guilty desires with both of her lovers. Her letters give evidence that she had had such an opportunity with one of them. It is found in this sentence: "Only think how long it has been since I have had any time at all with you." There can be no doubt her criminal desires were reciprocated by her paramours. From one of them, she says she had received a dear letter, which she read many times before committing it to the flames. Both her act in burning and her confession, show the true nature of their relations and the condition of their minds and hearts. In proving adultery by circumstances, two facts must be established—a criminal disposition or desire in the mind of both the defendant and her *particeps criminis*, and an opportunity to commit the crime. When both these are shown, guilt is necessarily inferred. *Berkmans v. Berkmans*, 1 C. E. Gr. 143; 2 Bish. on Mar. & Div. § 619. Proof that the parties have carried on a clandestine correspondence, made strong expressions of

Allaire v. Day.

attachment and held secret interviews, will furnish very strong evidence of criminal inclinations and desires. 2 *Bish. on Mar. & Div.* § 616.

The manner in which the defendant has conducted her defence, tends very strongly to strengthen the conviction that she is guilty. She has suffered herself, notwithstanding the fact that she has put herself in a defensive attitude, to stand absolutely undefended by anything in the nature of testimony, against a vast mass of evidence imputing to her acts of open lewdness and the most shocking indecency. One of the persons with whom she is charged to have held criminal relations has, during the whole period this suit has been pending, been constantly within the reach of the process of this court; and yet, so far as appears, she has never made the slightest effort to procure his evidence. I believe she could easily have procured the testimony of the other, if she had really desired it. Her failure to produce either of these witnesses, evinces, I think, a consciousness of guilt so deep as to have produced a feeling of helplessness. Some of the acts proved against her are too indecent and shameless to have been committed by any creature not of the lowest order of prostitutes. I confess, I find it impossible to believe that she has sunk to such an extreme depth of degradation. But there is other evidence of her guilt, so strongly confirmed by her own words and conduct as to put its truth beyond doubt. She must be pronounced guilty of adultery and divorced forever from her husband.

ISAAC S. ALLAIRE

v.

MARIA J. DAY and STANLEY DAY.

1. A final decree, made on hearing, in a case where the defendant's counsel failed to appear at the hearing, and also failed to lay before the court the evidence taken on behalf of the defendant, will not be

Allaire v. Day.

set aside, if it appears the same judgment must have been pronounced had the defendant's proofs been submitted and considered at the hearing.

2. A final decree, which is clearly right upon a full consideration of the whole case, will not be set aside merely to afford the defendant an opportunity to be heard on final hearing.

3. A deed which is fraudulent in fact as against creditors, may be avoided by subsequent as well as antecedent creditors.

On petition and proofs.

Mr. Nelson Runyon, for petitioner.

Mr. A. Zabriskie, for complainant.

THE VICE-CHANCELLOR.

This is an application to open a final decree on the ground of surprise and merits. A perfect case of surprise is shown. The counsel of the defendants did not appear at the hearing, nor did he have the defendants' proofs presented to the court. They had a right to believe that he would, without special instruction or direction, make a proper presentation of their defence. His failure to do so was a breach of duty that they were not bound to anticipate or guard against. His misconduct was a surprise, and if they have a meritorious defence, they are entitled to the benefit of it. The court is bound to hear them.

The case was brought to hearing regularly. The proofs on the part of the defendants had been fully taken, at least all that their counsel thought it advisable to take. They say, by their petition, that they had several other witnesses besides those examined, by whom they could have proved the matters alleged in their answer, but were advised by their counsel that they did not need further proofs. There is nothing to show that the advice was not proper under the circumstances. There is no charge of collusion between the complainant and the defendants' counsel. The only

Allaire v. Day.

charge they make against their counsel is that he suffered the case to be heard in his absence, and without having their proofs presented to the court. In the absence of fraud, shown by either direct proof or circumstances, the court cannot review his management. Nothing is shown which will justify even a suspicion that, in the production of the proofs, their counsel did not conduct their case with prudence and sagacity. It is true, he did not offer one of the defendants as a witness, but this fact furnishes no evidence of fraud or carelessness, or even a want of proper skill and judgment. It must be presumed that he knew his witness perfectly, and whether it was best to expose what he knew, or withhold it. It is also important to observe that no complaint is made on this ground in the petition, and it must therefore be understood that the defendants have no fault to find with the conduct of their case in that particular.

Do the proofs show a good defence? The defendants' proofs are now before the court. No further evidence has been taken. If, upon a full consideration of all the evidence, it now appears that, had the defendants' proof been before the court when the case was heard originally, the same judgment would have been pronounced, then it is obvious that no injustice has been done, and the decree should stand. The court should not go through the idle ceremony of opening the decree merely to give the defendants an opportunity to be heard, if it is now plain that, at the end of the delay that course will cause, precisely the same result must be reached.

The complainant is a judgment creditor of one of the defendants, and seeks, by this suit, to have his judgment charged upon certain lands held by the other, on the ground that the title was put in the other by the judgment debtor, for the purpose of defrauding his creditors. The defendants are husband and wife. The proofs produced by the complainant, standing unopposed, make a perfect case. They put in the mouths of both defendants admissions that the lands in question were conveyed to the wife to save

Allaire v. Day.

them from the husband's creditors, and show confessions, by the husband, that he fled from a neighboring state here to elude his creditors. They also show that the husband, after he became insolvent, fabricated an account on his books, in favor of his wife, by which she was represented to be his largest creditor. Looking simply at the complainant's proof, the decree now assailed is unquestionably right. The wife's title was a mere fraudulent cover. Is their force materially changed or impaired by the defendants' proofs? The wife claims to have received considerable sums of money from the estates of her father and mother, who were residents of England, and died there, and, further, that a part of this money was used by her husband in the purchase of the lands in controversy. These moneys were sent directly to the husband, and the wife thinks by drafts payable to him. She insists that they were her separate property and, as such, she had a right to make any use or disposition of them she thought proper. She admits that, as they were received, her husband took them and invested them in his business, with her consent, but she also says it was understood between them that, when he saw a good opportunity, he was to invest them for her. Such arrangements are not entitled to much favor in equity, for it seldom happens that the proper opportunity for the contemplated investment occurs, until after the husband has obtained all the credit his ostensible ownership of his wife's property can give him, and until his creditors are about to resort to legal means to compel him to pay his debts. He is usually permitted to hold himself out to the world as owner, for the purpose of contracting debts, but she generally steps in and attempts to assume the ownership just in time to rescue the property from her husband's creditors. Whether the parties actually intend deception or not, that is the natural effect of their conduct, and they should, on general principles, be held responsible for the natural consequences of their conduct.

The husband in this case made the bargain for the lands, raised the money and paid it, and did every other act that

Allaire v. Day.

was done in negotiating and completing the purchase. The wife was not present. He alone knows how the money was obtained, and whose it was. The wife had nothing whatever to do with the purchase, and is absolutely without the least personal knowledge respecting it. She has been examined as a witness, but he has not. She says her husband told her her money was used, and she refers to his books to confirm his statements, but admits that she knows nothing except what she has derived from her husband and his books. The law does not permit him to make evidence for his wife in this way. His books were not proved so as to be evidence in any case (*Cole v. Anderson*, 3 *Hal.* 68), and if they had been they were incompetent, as against the complainant, to show whose money was used. *Inslee v. Prall*, 1 *Dutch.* 665. All the wife's statements respecting whose money was used are without the slightest force as evidence; she simply tells what she was told, not what she knows herself. The husband's answer, on this point, is evidence (an answer under oath having been required by the bill), but its force is completely overcome by the admissions proved against him. Two witnesses have testified that he confessed he had falsely manufactured an account on his books in favor of his wife. Whether the account which he spoke of was the same to which his wife referred, as confirming his statements to her, does not appear, but the proof of his admission is uncontradicted, and, while that stands, it is impossible to believe his answer. The defendants' proofs leave the case made by the complainant's evidence practically untouched.

But it is insisted, even if it be found that the lands in question were paid for with the husband's money, the complainant is not in a position to assail the wife's title successfully, his judgment being founded on a debt incurred after she acquired title. The complainant became a creditor of the husband in 1869. That debt, he swears, remains unpaid, and in this he is uncontradicted. His judgment is founded on a debt contracted in 1871. The deeds to the wife were made in 1870. According to the complainant's proofs the

Easton v. New York & Long Branch R. R. Co.

husband procured the lands to be conveyed to his wife after he became insolvent, with design to save his property from his creditors, This rendered the deeds fraudulent in fact, and voidable by either antecedent or subsequent creditors. *Cook v. Johnson*, 1 *Beas.* 54; *Belford v. Crane*, 1 *C. E. Gr.* 271; *Ridgeway v. Underwood*, 4 *Wash. C. C.* 137. There are authorities which hold that a subsequent creditor may impeach a voluntary conveyance simply on the ground that it was executed in fraud of antecedent creditors, but in that case he is bound to show that some of the antecedent debts still remain unpaid. *Hunt on Fraud. Conv.* 52; 1 *Am. Lead. Cas.* 41; *Spirett v. Willows*, 3 *DeG. J. & S.* 292; *Freeman v. Pope*, *L. R.* (9 *Eq.* 205); *S. C.*, *L. R.* (5 *Ch. Ap.*) 536.

The main facts on which the complainant's right to relief rests are not disproved, or their force impaired in any material point by the defendants' proofs. Their defence is without merit; the order to show cause must therefore be discharged, with costs.

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EASTON and McMAHON

v.

NEW YORK AND LONG BRANCH R. R. CO., EDWARD G. BROWN,
H. R. CAMPBELL and J. B. CAMPBELL.

An order granting leave to bring an action at law on an injunction bond taken in this court, may be rescinded, if the equities of the parties were not considered at the time of its allowance.

On petition and order to show cause why an order giving leave to sue at law on an injunction bond, should not be rescinded.

Easton v. New York & Long Branch R. R. Co.

Mr. John P. Jackson, for applicants.

Mr. John W. Taylor, *contra*.

THE VICE-CHANCELLOR.

This is an application to rescind an order heretofore made in this case, permitting the defendants, Brown and Campbell, to sue the complainants and their surety at law on an injunction bond. A rescission is asked on the ground that the order was made under a misapprehension as to the correct rule of practice. The bond in question was given under the forty-sixth rule of this court, but does not contain the jurisdictional clause required by that rule, the words "such damages to be ascertained in such manner as the chancellor shall direct," being omitted. This omission, on the application for leave to sue at law, was held to deprive this court of all jurisdiction over the obligors and their surety, and to leave the question of their liability exclusively to the cognizance of the common law courts. For this reason, I declined, on that application, to consider whether a breach of the condition of the bond had occurred or not, or whether any equitable reason or consideration existed rendering it just and right to withhold permission. I thought if this court was not competent to determine the right of the parties and administer relief, the question whether a right of action existed, as well as the measure of damages, should, both as a matter of principle and sound practice, be left to the judgment of the tribunal where the suitor must go for his remedy. It seemed to me that if this court could not exercise jurisdiction over the parties, and afford a remedy, it should not attempt to intermeddle with the question whether the condition of the bond had been broken under such circumstances as to entitle the obligors to an action or not. The authorities which controlled my judgment will be found in *Easton and McMahon v. N. Y. and Long Branch R. R. Co.*, 11 C. E. Gr. 359. Another case, supporting the same

Easton v. New York & Long Branch R. R. Co.

view, has recently come to my notice. *Gracie v. Sheldon*, 3 Barb. 235.

At the time this opinion was pronounced, the question whether this court could give a remedy on an injunction bond in a case where jurisdiction was not conferred by the consent of the obligors, was undecided in this state. But the chancellor has since decided that this court has power over all bonds given pursuant to its orders and rules of practice, and also to determine all questions of liability and damages arising thereon. *Wauters v. Van Vorst*, 1 Stew. 103; *N. Y. & Long Branch R. R. Co.*, *vide infra*. In his opinion in the case last cited, he says, in referring to the order now under consideration: "When the order giving leave to sue at law was made, the subject was *res nova*, *Wauters v. Van Vorst* not having yet been decided. On the principle of that decision the order in question would not have been made, but the subject of liability and consequent damages would have been disposed of in the court of chancery." And the chief justice, in pronouncing the judgment of a majority of the judges of the court of errors and appeals, in the same case, says these bonds "are entirely under the control of the chancellor until he issues his order to put them in suit. If the equity of any possible case should require such order to be withheld, it is within the discretion of the chancellor to take such course." It is obvious the order assailed rests on views palpably erroneous when tested by either of these weighty judicial utterances.

According to the chancellor's judgment, consent by the obligors is not necessary to jurisdiction, but the court may, in virtue of its power to demand security, afford the person for whose protection the bond is taken a remedy thereon, according to its own peculiar mode of procedure; and, in the opinion of the chief justice, the obligors have a clear right, before being required to answer to a common law action, and as an essential preliminary step to such action, to the judgment of the chancellor whether any considerations exist rendering it inequitable, under the facts of the

particular case, for the obligee to seek reparation in a common law court for any injuries he may have suffered in consequence of the injunction. For the reasons already mentioned, no such preliminary inquiry was made in this case, but the whole matter of right and liability was sent to the forum having, as it was supposed, exclusive jurisdiction of the questions necessary to be presented for determination. The refusal to enter upon this inquiry may have deprived the obligors of the only defence they can successfully interpose to the demand of the obligees. Though they may have a perfectly good defence in equity, they may be defenceless at law. Against the error on which the order rests, they can only have relief and protection here. The order, being a matter resting entirely in the discretion of the court, is not appealable. *In re Anderson*, 2 C. E. Gr. 536. An attempt was made to question the validity of the order in this case, by an appeal, but the appeal was dismissed for the reason just stated.

A rehearing will always be granted when it is plain a mistake, either in law or fact, has been made (*Brumagim v. Chew*, 4 C. E. Gr. 337), or injustice has been done (*N. J. Zinc Co. v. N. J. Franklinite Co.*, 1 McCart. 380). And even if the order or decree has been partly acted upon, or partly executed, that will not constitute an insurmountable objection to a rehearing, if manifest error has been committed. *Achland v. Braddick*, 3 Jur. 39.

While the judgment of the court of errors and appeals cannot be said to possess the technical force of a judgment of reversal, still it so plainly declares that the obligors named in this bond are entitled to the judgment of this court upon a preliminary question upon which they have been refused a hearing, that to allow the order compelling them to litigate the question of their liability in a common law court, to stand, would seem almost to be a resolute persistence in an error which may deprive them of a defence that only this court can hear.

The application to rescind must be granted.

Blaker's executrix *v.* Receivers of N. J. Midland Railw. Co.

THE EXECUTRIX OF JOHN DEN BLAKER, deceased,

v.

THE RECEIVERS OF THE NEW JERSEY MIDLAND RAILWAY
COMPANY.

1. Negligence by a railroad company does not relieve a person attempting to cross its track from the duty of exercising ordinary care and prudence.

2. When a person is killed by collision with a locomotive, if it appears that his carelessness materially contributed to the disaster, his next of kin have no right to damages.

3. A person approaching a railroad crossing is bound to look and listen, and if he fails to do so, and injury ensues, he is without remedy; or if, using his eyes and ears, he sees or hears an approaching train, and foolishly tries the experiment of crossing in advance of it, and fails, his failure will be esteemed his own fault.

On petition for a remedy for damages alleged to have been sustained in consequence of death, where death was caused by negligence.

Mr. M. C. Gillham and *Mr. Coffey*, for petitioner.

Mr. C. B. Alexander, of New York, for receivers.

THE VICE-CHANCELLOR.

The petitioner seeks to recover damages for the death of her husband. Her claim is made under the statute giving a remedy to the personal representatives of a person killed, where death is caused by the wrongful act, neglect or default of another. (*Rev. p. 294.*) She charges that the death of her husband was caused by the negligence of the employes of the receivers. The negligence imputed to them need not be particularized—it may be admitted to be sufficient to give her a right of action. The important question is, Was not the person killed also guilty of negligence

Blaker's Executrix v. Receivers of N. J. Midland Railw. Co.

to such an extent as to deprive his next of kin of any right to damages? In cases of this class, the court is not at liberty to measure or compare the faults of the parties to see which is most faulty, and then compel the most culpable to make compensation to the other. Negligence by one party does not relieve the other from the duty of exercising ordinary care and prudence. In this case, it may be conceded that the employes of the receivers were grossly careless, yet, if it appears that the deceased was also careless, and his carelessness materially contributed in producing the collision which resulted in his death, or was the proximate cause of it, his next of kin have no right to damages. *Drake v. Mount*, 4 Vr. 445; *Harper v. Erie Railw. Co.*, 3 Vr. 90; *Baxter v. Troy & Boston R. R. Co.*, 41 N. Y. 61; *Wilcox v. Rome & Watertown R. R. Co.*, *Id.* 358; *Railroad Co. v. Houston*, 5 Otto 702.

Mr. Den Blaker, the petitioner's testator, was killed June 12th, 1876, while attempting to cross the track of the Midland Railway, on a public highway known as Midland avenue, in the county of Bergen. The railway at this crossing is built in a cut which, at the crossing, is about four feet deep, and increases in depth as it extends westward, until it reaches a depth of twelve and a half feet above the top of the rails. The length of the cut, from its western extremity to the crossing, is five hundred and eighty-four feet. Midland avenue, as it approaches the railway from the north, is also built in a cut for a distance of one hundred and thirty-five feet, and descends to the railway, from the point where the descent begins, at the rate of two and a half feet in every fifty feet. At a point on Midland avenue nine hundred feet north of the crossing, the track of the railway west of the cut can be seen for over one-fourth of a mile: at a point on the avenue seventy-five feet north of the centre line of the railway at the crossing, a person sitting in an open wagon can see up the cut, westward, one hundred and sixty feet; at fifty feet distant, he can look up the cut a distance of two hundred and sixty feet, and at twenty-five

Blaker's Executrix v. Receivers of N. J. Midland Railw. Co.

feet distant he can see through the cut. On the day the accident occurred, Mr. Den Blaker had been at work on some land north of the railway, which he was farming. He lived south of the railway, and had been accustomed to cross it frequently in going to and from his work. On the day in question, his work had been interrupted by a rain, and he had started to return home. He was in an open farm-wagon drawn by two horses. He was seen by an acquaintance when about four hundred yards north of the railway; he was then going towards it on what the witness describes as a jog trot; he had a blanket over his shoulders and drawn up around his neck, which he held together, in front, with one hand, while he held the reins with the other. As he passed the witness, he said he had some work to do and must hurry home. At this point the track of the railway west of the cut is in open view for about one-fourth of a mile. From this point the evidence furnishes no information respecting Mr. Den Blaker's movements or conduct until his horses were in the act of stepping upon the railway. Death was inflicted by an eastward bound train, consisting of two passenger cars and a locomotive, running at a speed of twenty-five or thirty miles an hour. The fireman says he first saw Mr. Den Blaker when the locomotive was twenty-five or thirty yards from the crossing; that his horses were just stepping on the track on a very slow walk; that Mr. Den Blaker had a blanket about his shoulders, his hat down over the side of his face, to keep, as he supposes, the rain out of his ear; his hands were resting on his legs, and the reins were slack. He further says that Mr. Den Blaker did not raise his head, nor make any effort to stop or escape, and that he does not believe that he saw the locomotive at all. Both the fireman and engineer swear that the bell was rung constantly while they were passing through the cut, and up to the time of the collision. A passenger on the train, and also two persons who were about four hundred yards north of the crossing, at the time of the disaster, swear that they did not hear

Blaker's Executrix v. Receivers of N. J. Midland Railw. Co.

the bell. A moderate wind was blowing from the east, which unquestionably reduced both the velocity and volume of the sound of the approaching train perceptible at the crossing.

It is now an established principle of law, almost universally recognized, that a person intending to cross a railroad track, is bound to look and listen for an approaching train before going upon it, and if he fails to do so, and injury ensues, he is without remedy; or, if he looks and listens, and sees or hears a train approaching, and then daringly assumes the hazard of attempting to cross in advance of it, and fails, he must bear the consequences of his folly. In a case substantially identical in its facts with the one in hand, the supreme court of the United States recently said, speaking by Justice Field: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for his safety. Negligence of the company's employes in these particulars was no excuse for negligence on his part. He was bound to look and listen, before attempting to cross the railroad track, in order to avoid an approaching train, and not go carelessly into a place of danger. Had he used his senses, he could not have failed both to hear and see the train which was coming. If he omitted to use them, and went thoughtlessly upon the track, he was guilty of culpable negligence, and so far contributed to his injuries as to deprive him of any right to complain of others. If, using them, he saw the train coming, and yet undertook to cross the track (instead of waiting for the train to pass), and was injured, the consequences of his mistake and temerity cannot be cast upon the company. No railroad company can be held liable for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure." *Railroad Co. v. Houston*, 5 Otto 702. Precisely similar views have been repeatedly enunciated by the courts of this state. A simple reference to the cases is all that need be done.

Denton v. Cole.

Even a brief summary of the principle decided in each would seem more like a labor of display than necessity or utility. *Central R. R. v. Moore*, 4 Zab. 831; *Runyon v. Central R. R.*, 1 Dutch. 558; *Telfer v. Northern R. R.*, 1 Vr. 199; *Harper v. Erie Railway*, 3 Vr. 88; *N. J. R. R. & Trans. Co. v. West*, Id. 95; *N. J. Express Co. v. Nichols*, 4 Vr. 439; *Drake v. Mount*, Id. 445; *Central R. R. v. Van Horn*, 9 Vr. 138; *Del., Lack. & West. R. R. v. Toffey*, Id. 530.

If we test the claim of the petitioner by these rules, it is obvious it must be rejected. It is plain, the disaster could not have happened had the deceased, in approaching the crossing, exercised the caution which the law requires, and which any person of reasonable prudence would have exercised in approaching a place of such well-known danger. So far as appears, his organs of sight and hearing were perfect, and had he made that use of them which a reasonable regard for his safety demanded, it would have been impossible for him not to have both seen and heard the train in time to have averted a collision. If the statements of the fireman are believed—and there is no evidence contradicting them—it is manifest death was the result of foolhardy heedlessness. The fact that the disaster happened, tends very strongly, in my judgment, to confirm the substantial truth of his story. But, in my opinion, scarcely any rational view of the evidence, as a whole, can be adopted, which will not fully establish such a complete case of contributory negligence as bars all right to damages.

The relief asked must be denied, and the petition dismissed.

ELIZABETH T. DENTON

v.

HARRISON COLE.

1. Where the owner of the equity of redemption pays off a mortgage with the funds of a third person, for the purpose of purchasing it for such third person, the mortgage will not be considered satisfied,

Denton v. Cole.

either as to the owner or subsequent encumbrancers; *aliter*, if the mortgage is paid with money of the owner, though he may pay it for the purpose of repledging it.

2. A mortgage may be assigned, in equity, by mere delivery, without writing.

3. It is a rule of equity that, where one of two innocent persons must suffer, he must bear the loss who, by his negligence, has made injury to one or the other possible.

On petition of Jacob Kimble, and proofs, and order to show cause why final decree shall not be opened and bill dismissed as to petitioner.

Mr. Lewis Cochran, for petitioner.

Mr. Thomas Kays, for complainant.

THE VICE-CHANCELLOR.

The petitioner asks that the final decree in this case be opened, and the bill, so far as he is concerned, be dismissed, on the ground that the complainant's mortgage, as to him, must be considered paid. The petitioner was not made a party to the suit originally, in consequence of his failure to record the assignment of the mortgage under which he claims, but his assignor was. The petitioner has since been admitted on his own application. The facts material to the point in dispute are, briefly, these: The complainant's mortgage was executed and recorded in 1862, and that of the petitioner in 1868. The mortgaged premises were conveyed to John E. Howell, December 5th, 1870. Howell, between December 13th, 1870, and February 18th, 1871, paid, in four payments, the amount due on the complainant's mortgage to its then owner, Andrew J. Gale. None of these payments were endorsed on either the bond or mortgage, but a loose receipt was given for each. The mortgage was not cancelled nor in any way spoliated. Howell, for some years prior to the time these payments were made, had had charge

Denton v. Cole.

of the complainant's money for the purpose of keeping it invested, and when they were made he held over \$4,000 of her money for investment. Howell says his payments to Gale were made with the complainant's money, and for the purpose of purchasing the mortgage for her. He also says that at the time the last payment was made he took an assignment of the mortgage to the complainant, which subsequently became lost. Another assignment was then procured, which bears date and is acknowledged August 1st, 1873. Mr. Gale denies that he ever made but one assignment, and that, he swears, he signed in May or June, 1874.

The question in dispute, it will thus be seen, is, Were the payments by Howell made in purchase or in satisfaction of the complainant's mortgage? The legal rules to be applied in its solution are free from all doubt. If Howell paid the mortgage with his own money, the debt was thereby discharged, and from that moment the mortgage ceased to have any force whatever against the petitioner, but if, on the contrary, the money he used was the money of the complainant, and he used it, not to pay, but to purchase, the mortgage for the complainant, the debt was not discharged, and the grasp of the mortgage, as a lien on the property, was never lost nor relaxed. *Hoy v. Bramhall*, 4 C. E. Gr. 563. A mortgage may be assigned, in equity, by delivery, without writing. *Galway v. Fullerton*, 2 C. E. Gr. 394. It is therefore unimportant whether Howell took an assignment to the complainant at the time he made the last payment or not. The evidence on this point is only material so far as it tends to affect Howell's credibility. Howell swears the money he used in paying Gale was the money of the complainant, which he held for investment for her, and that his payments were made in purchase for her, and not in satisfaction of the mortgage. Can these statements be believed? This question covers the whole field of inquiry.

Howell alone knows whose money he used. No attempt has been made to impeach his character. A man of his age, profession and large business transactions must have

Denton v. Cole.

had a well-established character. In the absence of proof to the contrary, it must be presumed to have been unassailable. Courts are not at liberty to cast aside the testimony of a witness against whom nothing is shown, and whose story is intrinsically reasonable and probable. It is true Howell is contradicted, but I am not sure that the opposing evidence is so unmistakably true as to show clearly that his is the false and the other the truthful. Most of the contradictions would seem to be rather the result of infirmity of memory, or honest misapprehension, than willful falsification. Mr. Gale says the assignment he made to the complainant was signed by him in May or June, 1874, and that, at the time he signed it, it was not dated, and that he never acknowledged it. The assignment put in evidence bears date August 1st, 1873, and has a certificate of acknowledgment appended bearing the same date. It is not disputed that Mr. Gale consulted counsel, before executing it, whether it was proper for him to sign it or not. It is probable that the assignment was submitted to his counsel. No careful counsel would advise with a client respecting an act so important, unless the paper was before him, nor would the omission of a date, or the insertion of a false date be likely to escape his attention.

It is clear that Mr. Gale is mistaken, when he says he did not acknowledge the assignment, or that the certificate of acknowledgment to this paper was procured by fraud or corruption. There is nothing in the evidence which will justify even a suspicion that a resort to such desperate means was necessary in order to procure an assignment. On the contrary, it appears that Mr. Gale was entirely willing to execute an assignment, on being satisfied that it was proper for him to do so. I think the papers bear very cogent testimony against the accuracy of Mr. Gale's recollections, and that, as between his recollection and that of Mr. Howell, they show that Mr. Howell's is much the more trustworthy.

Denton v. Cole.

It is also undisputed that, at the time the payments were made to Mr. Gale, Mr. Howell had sufficient money, belonging to the complainant, in his hands, to make the payments; the payments covered a period of nearly three months, but neither of them was endorsed on the papers—and the weight of the evidence shows that Howell directed that they should not be—and, although Howell was the owner of the mortgaged premises, and had possession of the mortgage from March, 1871, to the summer of 1874, he preserved it in its original condition, without cancellation or spoliation. The corroborating force of these circumstances serves, in my opinion, to dispel all doubts as to the truth of Howell's story. I believe the money he paid to Mr. Gale was the money of the complainant, and that he paid it in the purchase of the mortgage for her.

I am satisfied that the evidence of the gentleman who induced the petitioner to purchase the mortgage now held by him, in respect to what he says Howell said to him about the complainant's mortgage, is the result of a misapprehension. He says he knew that the complainant's mortgage stood open on the record while he was endeavoring to induce the petitioner to purchase the mortgage now held by him, but, that he ascertained from Howell, before the assignment was made to the petitioner, that the mortgage now held by the complainant was paid. He subsequently required Howell to guaranty the payment of the petitioner's mortgage. The assignment was made to the petitioner November 22d, 1871, and Howell's guaranty bears date December 2d, 1871. If what passed between the witness and Howell was understood by both to refer to the complainant's mortgage, and if it was clearly understood by both that the complainant's mortgage was paid, yet stood open on the record, it is difficult to conceive why its surrender for cancellation was not demanded when the assignment was made to the petitioner, or subsequently, when the guaranty was required, or why the guaranty was not so drawn as to assert distinctly that it was paid. But it is also proper

Ransom v. Geer.

to say that, at the time the petitioner took the assignment of his mortgage, he knew that the complainant's mortgage was prior to his, and that it still stood open on the record. So far as the evidence shows, he made no effort, then or subsequently, to have it discharged. His conduct was extremely careless, and this fact clearly brings him within the rule which declares that, where one of two innocent persons must suffer, he must bear the loss who, by his negligence, has made injury to one or the other possible.

The petitioner's proofs are insufficient, in my judgment, to dislodge the complainant from the position she is entitled to on the papers. The order to show cause must be discharged, with costs.

EXECUTORS OF JONATHAN H. RANSOM, deceased,

v.

DARIUS W. GEER.

1. At law, one of two executors cannot sue his co-executor, but in equity he may.

2. An executor cannot be permitted to conduct both sides of a litigation in which he has a personal interest adverse to the estate which he represents, and, in such a suit, he cannot be both a complainant and a defendant.

3. Where a suit is brought against an executor, for a debt due from him to the estate, he should not be made a complainant, but should be made a defendant in the character in which he owes the debt.

4. Proceedings in equity are conducted with less regard to mere form than proceedings at law.

5. When a bill, in its premises, sets forth sufficient facts to show that the complainant is entitled to relief as an executor, or that the defendant is liable as an executor, it is not necessary that either should be so styled in the commencement or conclusion of the bill.

6. Where a complainant is compelled, in stating his case, to show that he holds rights in the subject matter of the suit in two different

Ransom v. Geer.

characters, the court, in virtue of the facts upon which he gets a standing in court as a suitor, acquires jurisdiction over him for all purposes connected with the suit, and may, by its decree, settle and adjudge all his rights.

On hearing, on demurrer.

Mr. L. Zabriskie, for demurrant.

Mr. George R. Dutton, for complainants.

THE VICE-CHANCELLOR.

The demurrer in this case ascribes two faults to the bill: First, that it omits a necessary party who should be either a complainant or a defendant in his representative capacity; and, second, that it omits another person who is a necessary party defendant.

The bill is filed by Warren A. Ransom and Aaron P. Ransom, as executors of the last will and testament of Jonathan H. Ransom, deceased, against Darius W. Geer and Edward W. Geer. The complainants sue as executors, and ask relief against the defendants as individuals. The bill is founded on three mortgages made by Darius W. Geer and wife to the two complainants, and also to Darius W. Geer, as executors of Jonathan H. Ransom, deceased, and prays that payment of the mortgage debts may be decreed, and, in case default shall be made, that the mortgaged premises may be sold. It will be observed that Darius W. Geer is made a defendant as an individual, but is neither a complainant nor defendant in his representative capacity. This omission, it is insisted, renders the action fatally imperfect in its parties. It is not averred that the Darius W. Geer who is the mortgagor, is another and different person from the person of that name who is the executor. Both the mortgagor and the executor being designated by precisely the same name, I think it must be assumed, in the absence of an averment to the contrary, that both characters belong to the

Ransom v. Geer.

same person. That is the fact, and if it were possible, by a system of artificial reasoning, to reach a different conclusion, such conclusion would in this case be contrary to the truth.

At law, one of two executors cannot sue his co-executor, but in equity he may. *Rinehart's Ex'r v. Rinehart*, 2 *McCart*. 45; 3 *Wms. Ex'rs* 1911; 1 *Daniell's Ch. Pr.* 227; *Decker v. Miller*, 2 *Paige* 150; *Wood v. Brown*, 34 *N. Y.* 344 *McGregor v. McGregor*, 35 *N. Y.* 221; *Peake v. Ledger*, 8 *Hare* 313; *Smith v. Lawrence*, 11 *Paige* 208. It was said, in the case last cited, that an executor cannot sue his co-executor at law for a debt due by the latter to their testator, because each has the same right to the funds of the estate, and the effect of a common law recovery would be to transfer the particular fund represented by the debt, from the custody of the defendant into the exclusive possession of his co-executor. But one may sue the other in equity; for, a court of equity, owing to its peculiar mode of administering relief, may determine the question of how much is due from any one of the executors to the estate, without changing the possession of the fund, or compelling one to deliver the funds in his possession to the other; and may, also, after the amount of the debt in dispute is settled, make such order respecting its custody and disposition as justice shall require. These authorities render it obvious that it was not necessary, to the perfection of this suit, to make the executor, against whom relief is sought, a complainant. Nor could such a practice be tolerated as at all compatible with the proper administration of justice. An executor cannot, at the same time and in the same suit, be permitted to act both for and against the estate. *Black v. Shreve*, 3 *Hal. Ch.* 457. Fundamental principles forbid that he should be trusted to conduct both sides of a litigation, or even allowed to occupy a position where he would be entitled to know, in advance, by what means it was expected the claim against him could be established, and also what evidence would be offered in disproof of his defence. But was it necessary in this case

Ransom v. Geer.

to make Darius W. Geer a defendant in his representative capacity?

In *Evans v. Evans*, 8 C. E. Gr. 72, a suit was brought by one of three executors against the other two. By the will under which the three derived their authority, a devise of certain lands was made to each of the defendants, subject to the payment by each of a certain sum into the estate. The complainant, as legatee, was entitled to a part of the money. The complainant was not styled executor in the commencement of the bill, nor were the defendants styled as executors in the prayer for process; but the bill, in its premises, fully stated the facts upon which the complainant's right to relief rested, and correctly described the character and relation of the parties. Chancellor Zabriskie, in disposing of a demurrer grounded upon an objection that the bill should have been filed by the complainant as executor and against the defendants as executors, said: "Proceedings in equity are conducted with less regard to mere matters of form and technical objections than proceedings at law. When a bill, in its body, sets forth facts which give the complainant a right as executor, or make the defendant liable as such, so that the court, upon these allegations, can give the relief required, it is mere form, and useless form, to require that either party should be so styled in the commencement or conclusion of the bill." And, upon the question as to the character in which the defendants stood bound in that case, he said: "In this case the defendants were personally bound to pay this money into the estate. Upon their failure to do so, the complainant, as an executor, could file a bill to compel such payment. So long as they have not paid the money into the estate, the suit must be against them individually, to compel such payment." So here, the liability sought to be enforced is that of the individual and not of the representative. If a decree goes against him, it must be against the individual and not the executor; and the suit, therefore, is properly brought against the individual.

Ransom v. Geer.

In *Dare's Adm'rs v. Allen's Ex'rs*, 1 Gr. Ch. 288, it appeared that a legacy had been given to a married woman whose husband died intestate after the bequest took effect and before the legacy was paid. Administration was granted to the widow and two others, who, without the widow's consent, directed an action to be brought for the legacy in the names of all the administrators, charging that the husband had reduced the legacy into possession during his life-time, and claiming that his administrators were, therefore, entitled to it. On the application of the widow, Chancellor Pennington struck her name from the bill as a complainant, and made her a defendant, stating that it was not enough that she should be a party to the suit, so that the court could protect her interest, but that she had a right to be in a position where she would be free to set up rights in her own way. She was made a defendant in her individual capacity. These adjudications cover the whole field of controversy upon the first point, and leave no doubt that Darius W. Geer was properly omitted as a complainant, and that he was properly made a defendant as an individual.

One of the complainants, Warren A. Ransom, holds a mortgage in his own right, and not as executor, on the mortgaged premises. It is admitted to stand subsequent in order of priority to those held by the executors. He admits the complainant's case as made by the bill, and, so far as the record shows, he has no interest standing in the slightest conflict with the interests of the estate which he in part represents. He is a party to the suit, and has, by an express averment, submitted himself, in his individual capacity, to the power of the court, and agreed to perform any decree the court may deem it proper to make in respect to his mortgage. The defendant insists that this is not enough, but to make the suit perfect in parties, Mr. Ransom must be made a defendant in his individual capacity. But why? He is now in court in both his representative and individual capacity, and, in both characters, is entirely under the control of the court. The complainants could not state their case

Todd v. Rafferty's administrators.

in due legal form without disclosing all rights and interests in the mortgaged premises acquired subsequent to their first mortgage. Mr. Ransom was compelled, by the very nature of the case he was required to present, to come into court in both characters, and therefore, simply in virtue of the facts upon which he was permitted to acquire a standing in court as a suitor, the court obtained complete power over him, both as an executor and as an individual, and may lawfully adjudge and determine upon his rights and duties, in both characters, in dispensing justice respecting the subject matter of the suit. One of the fundamental purposes of a court of equity is to do complete justice by settling the rights of all parties having any interest in the subject of the suit, and to this important end it requires that all persons interested in the subject matter of the controversy shall be brought before the court, either as complainants or defendants, that all their rights may be settled and concluded by its judgment. That requirement, in my opinion, has been substantially complied with in this case, and the demurrer should, therefore, be overruled, with costs.

JOSEPH C. TODD

v.

ADMINISTRATORS OF PHILIP RAFFERTY, deceased.

1. Profits made secretly by one of two partners, in the business of the firm, are partnership property.
2. The statute of limitations applies to actions of account between partners.
3. Where the accounts between partners have been closed for six years, and there has been acquiescence for that period, without fraud, the statute constitutes a bar; but the statute affords no defence in a case where there have been dealings within six years.

Todd v. Rafferty's administrators.

4. The statute does not begin to run against each item of an account between partners, from the time it becomes a part of the account, but if part be within six years, it draws that which is before after it.

5. When the court assumes jurisdiction on the ground of fraud, the statute only begins to run from the discovery of the fraud.

6. A court of equity will not sit as the divider of gains which are the proceeds of crimes or frauds involving moral turpitude.

On final hearing on bill, answer and proofs.

Mr. Socrates Tuttle, for complainant.

Mr. William Pennington and *Mr. A. B. Woodruff*, for defendants.

THE VICE-CHANCELLOR.

This is a suit by a surviving partner, against the administrators of his deceased copartner, for an account. In January, 1859, Joseph C. Todd and Philip Rafferty formed a copartnership, under the name of Todd & Rafferty, to carry on the business of manufacturing and selling machinery, and also for the purpose of doing a general commission and agency business for the purchase and sale of machinery and machinists' and railroad supplies. This relation continued until March, 1872. They then discontinued business, and transferred a part of their assets to a corporation known by the name of the Todd & Rafferty Manufacturing Company. No formal dissolution was ever agreed upon, and it is admitted that the partners never finally settled or adjusted their affairs. The works at which their machinery was made were located at Paterson, and this part of the business was managed by Mr. Todd; they also had an office and store in the city of New York, where their sales were principally made, and the mercantile part of their business conducted. Mr. Rafferty had charge of this part of the business. A separate set of books was kept at each place. Mr. Rafferty died in July, 1872, and the bill in this case was

Todd v. Rafferty's administrators.

filed March 28th, 1876, after an unsuccessful effort had been made to settle the matters in dispute by arbitration.

The bill exhibits but a single ground of complaint, viz.: that Mr. Rafferty, during the existence of the partnership, carried on a part of its business secretly, without entering it upon the books of the firm, and appropriated the profits to his own use. The sum thus withdrawn, it is said, exceeds \$30,000. The proofs in demonstration of this charge are complete. The private books of Mr. Rafferty, in which this business was entered, are in evidence. They show that, up until within about three years of the discontinuance, he carried on a very considerable business, precisely like that carried on by the firm, and took the profits to himself. The evidence, in my estimation, renders it equally certain that such business was carried on clandestinely. A partner, having equal rights and powers, and pursuing business for profit, would never willingly consent that so valuable a part of the joint business should be diverted by his associate to his own benefit. In the absence of an express stipulation to the contrary, the parties to a contract of copartnership always understand, from the very nature of the relation, that all gains made by either in the prosecution of the common business, shall be joint property. Generally, a copartnership is a combination of the capital, skill, industry and influence of two or more persons for the prosecution of a particular business for their mutual benefit, and a claim by one that he has a right to carry on a part of the joint business for his own advantage and to the manifest injury of his associates, is so utterly destructive of the rights and duties legally incident to the relation, that it will never be sanctioned by a court until it is clearly shown that he holds such right by the assent of his associates. It is certain that the existence of such right should not be inferred from slight circumstances, and that is all there is to support it in this case. I consider the fact clearly established, that Mr. Rafferty carried on, clandestinely, a part of the business which he and the complainant had associated themselves

Todd v. Rafferty's administrators.

together to prosecute for their joint benefit, and, consequently, I deem it to be entirely beyond dispute that the complainant is entitled to an account of such business, and to be awarded a share of its profits, unless some other sufficient defence has been shown.

But the defendants insist that the complainant's right of action is barred by lapse of time, and they have invoked the protection of the statute of limitations by their answer. It will be remembered that the business of the partnership was discontinued in March, 1872, but no final settlement was then had, nor had been previously made, and that this suit was commenced March 28th, 1876. The business carried on by Mr. Rafferty, in fraud of the complainant, ceased in January, 1869. More than six years elapsed between the cessation and the commencement of this suit. This is the delay on which the defence rests.

The statute undoubtedly embraces actions of account, either at law or in equity, between partners. *Cowart v. Perrine*, 3 C. E. Gr. 457. And where the accounts have been closed for six years, and there has been acquiescence for that period, unexplained by circumstances and not counter-vailed by an acknowledgment, the statute constitutes an insuperable bar. *Barber v. Barber*, 18 Ves. 286; *Tatam v. Williams*, 3 Hare 357; *Story on Part.* § 233, note (4); *Coll. on Part.* § 374. But the statute has no application to a case where there have been dealings within six years, where assets have been converted into money, or assets have been applied in discharge of partnership liabilities within that period, and no settlement has ever been made. And in such a case the statute does not begin to run against each item from the time it becomes a part of the account, but if a part of the account be within six years, that part of it draws after it the items before six years, so as to protect them from the statute. *Stout v. Seabrook's Ex'rs*, 3 Stew. 187; *Coster v. Murray*, 5 Johns. Ch. 530; *Miller v. Miller*, L. R. (8 Eq.) 499; *Atwater v. Fowler*, 1 Edw. Ch. 423. In the case last mentioned, the court said, until the business of winding

Todd v. Rafferty's administrators.

up the affairs of the partnership is in such a situation that an account can be stated, and its affairs finally closed, the partner asking relief is not in laches in not demanding an account. Applying these rules to the facts of the case in hand, it is perfectly obvious the statute does not afford even the shadow of a defence.

But even if the partnership dealings appearing upon the books of the firm had been fully settled and closed for more than six years prior to the bringing of this suit, still the defence of the statute would be unavailing to the defendants, for the rule is well established in equity, that where the complainant's action is grounded on a fraud, which the defendant has concealed until sufficient time has run to enable him to set up the statute, the statutory period will not be considered to have commenced until the fraud is discovered, or would have been discovered had reasonable diligence been exercised. *Ang. on Lim.* § 183; *Story's Eq. Juris.* §§ 1521, 1521a; *Hoveden v. Lord Annesley*, 2 Sch. & Lef. 634; *Meader v. Norton*, 11 Wall. 458. Vice-Chancellor Wigram, in *Blair v. Bromley*, 5 Hare 541, said, where the court assumes jurisdiction on the ground of fraud, the statute only begins to run from the discovery of the fraud; and this doctrine was reiterated by Lord Cottenham when the case came before him on appeal. 2 Phil. Ch. 354. In *Brooksbank v. Smith*, 2 You. & Coll. (Exch. Eq.) 60, Baron Alderson said, courts of equity adopt the statute of limitations to assist their discretion. In cases of fraud, however, they hold that the statute runs only from discovery, because the plaintiff's laches does not commence until he is acquainted with the circumstances. Chief Justice Barker held, in *Farnam v. Brooks*, 9 Pick. 244, that, even at common law, fraud, if not discovered until within six years before action brought, was a good answer to the statute; but this view is unquestionably opposed to the general current of judicial opinion. *Troup v. Smith*, 20 Johns. 46; *Allen v. Miller*, 17 Wend. 204; *Smith v. Bishop*, 9 Vt. 110; *Fee v. Fee*, 10 Ohio 469; *Clarke v. Marriott*, 9 Gill 331. But it will be found these cases

Todd v. Rafferty's administrators.

uniformly concede that it is an established doctrine of equity jurisprudence, that a defendant will not be permitted to avail himself of the statute, when it appears he has, by fraud, prevented the complainant from coming to a knowledge of his rights. In my opinion, it is not possible to take any view of this case which will make the statute of limitations a bar to the complainant's action.

It is admitted that part of the gains made by Mr. Rafferty, in the business he carried on secretly, were obtained by the practice of fraud. Instances are shown where, acting as the agent of a purchaser, he would purchase at one price and sell to his principal at a price considerably larger, thus becoming both seller and purchaser, and getting both commissions and a profit. The complainant claims a share of the gains thus fraudulently made, and he grounds his right on a series of cases which hold that, when an illegal or fraudulent transaction has been completed, and the money earned by it, being due to two or more persons, has been received by one or a third person for the wrong-doers, an action will lie in favor of any one of the wrong-doers for his share. It is claimed for this doctrine, that it does not violate that salutary principle of juridical ethics which declares that a court will never lend its aid in the enforcement of a contract founded in immorality or illegality, for, it is said, in such cases the illegal transaction being fully completed, the court, in compelling the wrong-doers to divide, does not enforce the original contract between the parties, but proceeds upon an implied promise arising from the reception of the money, and that such implied promise is so entirely distinct from the original arrangement as to be, in legal estimation, free from its taint. This view, substantially, has been adopted in the following cases: *Faikey v. Reynous*, 4 Burr. 2069; *Petrie v. Hamray*, 3 T. R. 418; *Tenant v. Elliott*, 1 Bos. & Pul. 3; *Farmer v. Russell*, Id. 296; *Nash v. Ash*, 1 Eden 379; *Watts v. Brooks*, 3 Ves. 612; *Sharp v. Taylor*, 2 Phil. Ch. 801; *McBlair v. Gibbes*, 17 How. 232; *Brooks v.*

Todd v. Rafferty's administrators.

Adams, 2 Wall. 70; *Woodworth v. Bennett*, 4 Hand 273; *Merritt v. Millard*, 4 Keyes 208.

But this doctrine has been repudiated with considerable sternness, in this state, by this court and also by the supreme court. In *Watson v. Murray*, 8 C. E. Gr. 257, one of several partners brought his bill for the dissolution of a copartnership engaged in carrying on the lottery business, and asking, also, for the sale of its property and a distribution of its assets. Although it did not distinctly appear by the pleadings (the case was heard on demurrer) where the business had been carried on, in order to put the case in the best possible shape for the complainant, it was assumed it had been carried on in states where such business was lawful. Vice-Chancellor Dodd held that the action could not be maintained, characterizing it as an attempt to use the power of the court to apportion among criminals the gains resulting from their crimes. The lottery business, by our law, is a misdemeanor, and any gains resulting from its prosecution, whether carried on here or elsewhere, must, in our tribunals, be regarded as the spoils of crime.

The case presented to the supreme court was less offensive in its moral features. It was an action to recover part of the proceeds of a transaction simply illegal, not criminal. The plaintiff and defendant were doing business separately as loan brokers. They had an arrangement by which they were to assist each other, and under which, if the plaintiff sent a customer to the defendant for whom he procured a loan, he was to be entitled to half the commissions received by the defendant. It was understood that the commissions to be charged were to be in excess of the rate allowed by law. Chief Justice Beasley, in stating the reasons why he could not assent to the rule which would constrain a court to sit as the divider of such gains, said: "Until the money, which is the wages of the ill-doing, has come into the hands of the several delinquents, the illegal transaction, so far as they are concerned, is not closed, and unless the matter has been entirely concluded by such adjudications that it would be but captiousness to

Todd v. Rafferty's administrators.

dissent from them, it might well be worth consideration, whether it would not be more consistent with the usual course of the law, and more protective of public interest, to proclaim the outlawry of such affairs from the first step to the last. If A. and B. make sale of forged papers, and the proceeds are paid by the purchaser to A., a court of law can scarcely be said to perform either a very respectable or useful function when it assists B. in obtaining his share of the profits of the business. Nor would it seem that it should give much concern to those who dispense public justice, if one of two such delinquents should be successful in fraudulently withholding from his companion a share of the wages of iniquity. Under such conditions, the assistance of the law might, it would seem, be rightfully refused, not for the sake of the party who thus cheated his associate in guilt, but in order to render such affairs as precarious and difficult as possible to those who might be inclined to enter upon them." *Gregory v. Wilson*, 7 Vr. 320. These adjudications, in my judgment, definitely settle the principle which must be applied in declaring the rights of the parties to this suit.

It is true, the gains sought to be recovered in the cases just referred to, resulted from ventures carried on in defiance of positive statutory prohibitions, but the rule which declares that an agent, authorized to buy, shall not himself become the vendor, and that any profit secretly made by him, in violation of this rule, is the fruit of fraud, has all the force a legal rule can have. It is rooted in justice and sound policy, and stands prominent among those cardinal principles of justice which have received the approval of the general judgment of mankind as being indispensable to the promotion of honesty and fair dealing. In my estimation, there is little ground for comparison, on the score of the moral quality of the acts, between an open demand and acceptance of illegal brokerage and the secret betrayal of confidence. The first is simply an open violation of law, while the latter adds to the wrong of the first, secret treachery. The first is the doing of an act prohibited by law, while the latter is the

Todd v. Rafferty's administrators.

commission of a wrong intrinsically evil. But little distinction can be made between this mode of cheating and obtaining money by false pretence, and it is quite probable some of the gains in dispute were the product of that crime.

But it is said the complainant is liable, as surviving partner, to the persons defrauded, for the whole amount fraudulently gained, and that, in such a case, right and liability should be reciprocal. The general rule may be admitted to be that all the members of a firm are liable for the fraud of one of their number, committed in the business of the partnership, though they in no way participated in the wrong, and derived no advantage from it, and though the fraud-doer alone was benefited by the fraud. *Gow on Part.* 55; *Story on Part.* § 108. But that question is not before the court, and cannot be determined in this suit. And even if the complainant's liability was clear, that fact would not, at this time, afford him a right to the judgment he claims. Generally speaking, wrong-doers cannot ask for contribution, and this rule is just as applicable to partners as to others. *Story on Part.* § 220. Cases may possibly occur where the innocent members of a firm may, in consequence of their association, be required, as to third persons, to bear losses which, as among themselves, should be wholly borne by the wrong-doing member. In such a case it would seem that contribution, or even full indemnity, would be an act of justice, but it would also seem to be clear that such relief should not be given on the bare possibility that a loss of that character may hereafter ensue. Relief in such a case should not go in advance of harm. The consideration of the question whether the complainant has a remedy or not, on this ground, may, very properly, be deferred until he has actually suffered wrong. His wrongs at present, under this head, are purely anticipatory.

I find nothing in the case which entitles the defendants to an account from the complainant of the business carried on by him in connection with other persons than Mr. Rafferty. Such business was totally dissimilar, in every point of view,

Todd v. Rafferty's administrators.

from that conducted by Mr. Rafferty and the complainant, and its prosecution took nothing from the latter concern to which it was in anywise entitled, and, so far as can be perceived by any light furnished by the proofs, its prosecution could not in any way injure or prejudice the latter concern.

The complainant is entitled to an account of the partnership dealings, and such account must include all gains lawfully made by Mr. Rafferty during the term of the partnership, in selling machinery and machinists' and railroad supplies, whether manufactured by the partnership or by others; and, also, all gains lawfully made by him in purchasing, for others, machinery and machinists' and railroad supplies.

A reference will be ordered, in order that an account may be taken in conformity with the principles herein stated.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1878.

THEODORE RUNYON, ESQ., ORDINARY.

JACOB H. VANDERBECK, executor, appellant,

v.

HENRY H. VANDERBECK, respondent.

The delivery of a note by the holder to the maker, with intent thereby to discharge the debt, does discharge it.

On appeal from decree of Bergen orphans court.

Mr. G. Ackerson, Jr., for appellant.

Mr. A. Benedict, for respondent.

THE ORDINARY.

The question argued on the hearing was, whether the respondent, Henry H. Vanderbeck, is chargeable with the amount of a certain promissory note and interest, given by him to the testator, his father, in or about 1870. The appellant alleges that the amount of the note was \$1,750, that it was given to the testator for so much money lent by

Vanderbeck v. Vanderbeck.

him to the respondent; that the latter obtained possession of it in the life-time of his father, through an arrangement between them, by which it was delivered up to him in consideration of the delivery to his father of his title-deeds for his land, to be held as security for the payment of the debt which the note represented and the interest thereon; that his father held the deeds, accordingly, up to the time of his death; that, after his father's death, and at the time of making the inventory and appraisement, the respondent, who was one of the executors of his father's will, wrongfully took the deeds from among the testator's papers, on the occasion of their being produced by the executors to the appraisers, and has ever since retained them, denying all liability for or on account of the note, and claiming that his father forgave him the debt, and delivered the note up to him, accordingly, to be cancelled, and that his father held the deeds merely for safe-keeping and at the respondent's request.

It is clear, from the evidence, that the note in question was given up by the testator to the respondent, to be cancelled, about two years before the death of the former. It is also clear that the note was for the sum of \$1,550, and not \$1,750, as the appellant insists. It was given for money advanced by the testator to the respondent for part of the purchase-money of a small tract of land which the latter purchased in May, 1870, for a place of residence, from Samuel P. Bush, at the suggestion of the testator, who promised to aid him in paying for it. It appears that the respondent then contemplated removing, with his family, to Paterson, to which the testator was opposed, and urged him to buy that property. Of the purchase-money (\$2,500), the respondent paid \$1,000 of his own funds, and the rest he obtained from the testator, who, a few days afterwards, requested him to give him his note for the money, which was done. The respondent, on giving the note, expressed to the testator his dissatisfaction at being required to do so, saying, among other things, that he had purchased the

Vanderbeck v. Vanderbeck.

property in deference to the wishes of the testator and against his own inclination; expressed a wish that the testator would take a conveyance of the property from him, and pay him what he had contributed to the purchase-money, and added that he would not be able to pay the interest, and that his brothers and sisters would, after the testator's death, compel him to pay the note out of his share of the testator's estate. The testator replied that he would see that that did not take place, and, adding that he always had an idea of keeping the loaf under his own arm, took the note and put it in his pocket. The respondent says that he never after that spoke to the testator on the subject of the note, nor did the testator speak to him in reference to it, until the spring of the year 1873; that then the testator's wife, the respondent's mother, came to his house and told him that the testator had requested her to tell him to come down—that he was going to give him the note. He further testifies that he, accordingly, a few days afterwards, went to see his father, and that the latter called for his box of papers, which was handed to him; that he then took out the envelope containing the notes which the respondent had given him, and took from it the note of \$1,550, and laid it on the table before him; that he then handed to the respondent the note for \$250 (which was a note also given by the respondent to the testator), and told him to endorse the interest on it, which the respondent accordingly did, and thereupon handed him the amount of the interest, calculated at the rate of seven per cent. per annum; that the testator counted the money and returned part of it to him, saying that the other children paid him only six per cent., and that he would take no more from the respondent; that he then put that note in the envelope, and replaced it in the box, and handed the note of \$1,550 to the respondent, saying, "Now I give this to you, and you can take care of it; I give it in your hand, and you know you have it;" that thereupon the respondent's mother said to the testator; "Now, man, you must know what you are doing, for the

Vanderbeck v. Vanderbeck.

rest will no doubt find fault with it;" to which the testator replied: "If they don't find this note when I am gone, I don't see what they can do about it;" and that she said, in answer, that perhaps it would be better if the testator "should write something about it," to which he rejoined, "I believe I can do with my own as I will; I have written all that I think is necessary." He further says, that the testator then turned to him and said: "Now you make away with it, so that it cannot be found when I am gone, and I will risk it." The respondent took the note, and, after cutting off the upper part of it, containing the amount in figures, the stamp and the date, with a view to keeping it as a memento of his father, burnt the rest of the paper.

The respondent's wife and his mother corroborate him in these statements. His mother, who was called as a witness for the appellant, testifies that, when the testator handed the note to the respondent, she said to him: "Now, do you know what you are doing?" that he replied, "Yes, I know what I am doing;" and that she then said, "Now, don't you be too fast." She says that she might have said, "You must know what you are doing, for the rest will very likely find fault;" and she adds that he then said, in answer to her, that "he had a right to do with his own as he had a mind to." The respondent produces the strip of paper cut by him from the note. It corroborates him in his statement as to the amount. His mother, also, it may be remarked, corroborates him on that head. The respondent and his wife testify that the deeds for his property, which were in the testator's possession at the time of his death, were left with him merely for safe-keeping.

The evidence on which the appellant relies to establish an equitable mortgage, by deposit of the respondent's title-deeds, falls far short of the mark. Jacob H. Vanderbeck, indeed, testifies that when he asked the respondent what those deeds were there (in the testator's box, among the papers,) for, the respondent replied that he left them with his father for the note; but he afterwards says that what the

Vanderbeck v. Vanderbeck.

respondent said was, that he had offered his father his deed of the property for the note, as he could not pay the interest. This is in accordance with the testimony of the respondent, for, as before stated, he says that, in connection with the note, he offered to give up the property to his father on receiving the amount which he had contributed of his own money to the purchase.

Albert G. Zabriskie testifies to a statement voluntarily made to him, by the respondent, after the testator's death, in a casual conversation in the street, in reference to the controversy which existed between him and his brothers, in reference to the note. He says that he asked no questions of the respondent, and paid "no very particular attention" to what was said, any more than he would in any conversation which did not concern him, or in which he had no personal interest. The conversation took place about two years before the witness gave his testimony. It is not difficult to conclude, from his statement, that what was then said to him was, probably, strictly in accordance with the testimony of the respondent, and that any apparent variations are attributable to the fact that the witness had no interest in the subject of the conversation, paid no particular attention to it, and was not even seeking information on the subject of this family dispute. Under the circumstances, he could not be expected, after the lapse of so long a period, to remember even the outlines of the statement with any accuracy. The salient points of the statement, as it is remembered by the witness, appear to have been the giving up of the note by the testator to the respondent, the leaving of the deed of the Bush property with the testator, and the fact that the deed was still there when the inventory was made. He says, it may be remarked, that the respondent said that he and his father settled up those matters. The evidence, on the part of the appellant, of the statements of the testator, made by him in the absence of the respondent, and after the note had been given up, in reference to the note, and his intention to alter his will, so as to equalize the

Vanderbeck v. Vanderbeck.

shares of his children, in view of the advance to the respondent of the money for which that note was given, is not competent. But, if it be admitted, it is clearly of no value to the appellant, for JOHN B. Vanderbeck says that the testator told him in April, 1875, that the deed was delivered to him to be held as security until the testator could alter his will so as to equalize the distribution of his estate among his children; while it appears that the note was given up at least a year before the testator's death, which took place in April, 1875, and that he made his last will some months after the note was given up. It was made in January, 1875. The testator's widow says that her husband had the note and the deed together, and when he gave up the note the deed was retained.

Jacob H. Vanderbeck testifies that in February, 1875, the testator told him that he had loaned the note to the respondent; that the respondent had only paid him interest on it once or twice; that he would give the respondent the note, and make it right with the other children. But it appears, clearly, that the note had been given up a year before that time.

It is unnecessary to pursue the examination of the testimony further. The evidence is that the testator, a year or two before his death, for reasons satisfactory to him, gave up to the respondent, as he of course had a right to do, the note of \$1,550 to be cancelled, forgiving the debt. The delivery of a note by the holder to the maker, with intent thereby to discharge the debt, discharges the debt. 3 *Eq. Ca. Abr.* 618: *Wentz v. Dehaven*, 1 *Serg. & R.* 317. *In re Campbell's estate*, 7 *Pa. St.* 100. The testator had, in the wills he had made previously to that time, given to the respondent a greater share of his estate than he had given to his other children. He considered himself under special obligations to him for attentions, and he was especially indebted to him for the interest he had taken in his affairs in connection with the sale of his farm, and which had proved of great pecuniary advantage to him; for, by follow-

Vanderbeck v. Vanderbeck.

ing his advice, and holding his property for an advance, he had obtained a price nearly double that for which he would otherwise have sold it. After he gave up to him the note, he made his will, and, notwithstanding the fact that he had given up the note to him, he, by the will, gave to the respondent an equal share of his property with the other children. The appellant has failed to substantiate the claim set up in his answer as to the note in question. The respondent appears to have never denied, but always to have recognized, his liability on the other notes made by him, and held by the testator at the time of his death.

The proceedings in this case were taken, by petition, for the recovery of the respondent's share of his father's estate under the will. The appellant, by his answer to the petition, admits that he has had sole charge of the personal estate which was inventoried, and that the personal estate of the testator is capable of ready division or distribution, according to the directions and provisions of the will. It does not appear, by the record, whether the appellant has settled his final account or not, but no objection to a decree was made on that score before the orphans court or in this court. The orphans court decreed that it be referred to the surrogate to ascertain the sum due the petitioner, declaring that his share was one-fourth of the estate, and charging him with two notes of \$250 and \$50, respectively, before referred to, his liability whereon he has always recognized. No objection was made, either in the answer or on the hearing, to the regularity of the proceedings.

The decree will be affirmed, with costs.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
NOVEMBER TERM, 1878.

BRIDGET O'NEIL and others, appellants,

v.

EDMUND J. CLEVELAND and others, executors, &c.,
respondents.

One of two executors loaned moneys of the estate on bond and mortgage, reserving usury thereon and appropriating it to his own use. On foreclosure by the executors on behalf of the estate,—*Held*, that such usury could be set up as a defence.

On appeal from a decree of the chancellor, reported in
2 *Stew.* 457.

NOTE.—Usury being a strictly personal defence, can be set up only by the immediate parties to the contract or their representatives, although the right to recover it may, it seems, be assigned. (*Breckenridge v. Churchill*, 3 *J. J. Marsh.* 13; see *American Mach. Co.'s Case*, 83 *Pa. St.* 198; *Low v. Pritchard*, 36 *Vt.* 183; *Meech v. Stoner*, 19 *N. Y.* 26.) Amongst others, the following cases illustrate this rule:

I. Strangers can derive no advantage. *Tyler on Usury*, 410; *Stanley v. Kempton*, 30 *Me.* 118; *Gwynn v. Lee*, 9 *Gill* 137; *Mordecai v. Stewart*, 37

O'Neil v. Cleveland.

Mr. W. R. Wilson for appellants.

Mr. E. S. Atwater, for respondents.

DALRIMPLE, J.

The bill in this case was filed to foreclose a mortgage. The defence is usury, under the statutes of this state. The face of the mortgage is \$2,225, and was given for money borrowed, payable three years after the date of the mortgage, with interest payable semi-annually.

It is conceded that the borrower, in fact, received but \$1,891.25, the deduction having been fifteen per cent. from the amount for which the mortgage was given. It appears that O'Neil, the mortgagor, requested one Davis to procure for him the loan. Davis applied to one of the executors of the estate of Cleveland, deceased, for the money, and was successful in his application. The executor who made the loan, acted in the transaction of the business without consultation with his co-executor, and, upon completion of the negotiation, gave to Davis a check, payable to Davis's order, for the \$2,225 agreed for. This check was signed by the drawer, with the addition or description to his name of the

Ga. 364; *McArthur v. Schenck*, 31 *Wis.* 673; *Drake v. Chandler*, 18 *Gratt.* 909; *Lehman v. Marshall*, 47 *Ala.* 362; *Taylor v. Jackson*, 5 *Daly* 497; *Drake v. Lowry*, 14 *Iowa* 125.

II. Nor creditors by simple contract. *Graham v. Moore*, 7 *B. Mon.* 53; *Lee v. Fellowes*, 10 *B. Mon.* 117; *Mills v. Carnly*, 1 *Bosw.* 159; *Carow v. Kelly*, 59 *Barb.* 239; *Scott v. Nesbit*, 2 *Br. C. C.* 641; *Ware v. Horwood*, 14 *Ves.* 31; *Jarman's Case*, 4 *Dea. & Ch.* 393; *Smith v. Fisher*, 2 *Desauss.* 275; *Campbell v. Johnston*, 4 *Dana* 181; see, however, *Pope v. Solomons*, 36 *Ga.* 541; *Busby v. Finn*, 1 *Ohio St.* 409; *Union Bank v. Bell*, 14 *Ohio St.* 200; *Moffatt v. McDowall*, 1 *McCord's Ch.* 434. Creditors, after judgment and execution, have been deemed an exception, because of their liens (*Dix v. Van Wyck*, 2 *Hill (N. Y.)* 522; *Thompson v. Van Vechten*, 27 *N. Y.* 568; *Carow v. Kelly*, 59 *Barb.* 239; *Van Tassell v. Wood*, 12 *Hun* 388; *Nisbet v. Walker*, 4 *Ga.* 221; *Phillips v. Walker*, 48 *Ga.* 55; *Butler v. Myer*, 17 *Ind.* 77; *Swanson v. White*, 5 *Humph.* 373; *Brooke v. Morris*, 2 *Cin. Sup. Ct.* 528); but this has been denied elsewhere (*Pickett v. Pickett*, 2 *Hill Ch.* 470; *Good v. Grant*, 76 *Pa. St.* 52; *Baskins v. Calhoun*, 45 *Ala.* 582; *Carmichael v. Bolfish*, 32 *Iowa* 418; *Boughton v. Smith*, 26 *Barb.* 635; *Bensley v. Hornier*, 42 *Wis.* 631; *Estill v. Rodes*, 1 *B. Mon.* 314. See *Miners Trust Co. v. Roseberry*, 81 *Pa. St.* 309.)

O'Neil v. Cleveland.

words "executor of the estate of Joseph Cleveland, deceased."

Davis, from the amount of the check, retained for his own commissions in negotiating the loan, one per cent., being \$22.25, and, in a very few days after the check was given to him, gave his own check for \$311.50 to the executor who had acted in the business on behalf of the estate. The check from Davis to the executor was to the order of the latter in his individual name. In it no reference was made to the estate of which the drawee was executor, to the loan which had been made to O'Neil, or to any account or indebtedness in favor of the drawee against the drawer. The balance of the \$2,225 was paid by Davis to or for the use of the mortgagor.

From the foregoing statement, it appears that the mortgagor received \$1,891.25 only. The balance of the \$2,225 was divided between Davis and the executor in the proportion of one-fifteenth to the former, and fourteen-fifteenths to the latter. Upon the transaction as thus disclosed, the defence of usury is based.

The complainants insist, in the first place, that if the alleged defence sufficiently appears in proof, the answer

III. Nor an endorser (the payee) after maturity. *Frank v. Longstreet*, 44 Ga. 178.

IV. An accommodation endorser may avail himself of such defence. *Warren v. Crabtree*, 1 Greenl. 167; *Duncomb v. Bunker*, 2 Metc. (Mass.) 8; *Weimer v. Shelton*, 7 Mo. 237; *Gray v. Brown*, 22 Ala. 262; *Receiver v. Wild*, 10 Nat. Bk. Reg. 568, 578; *Williams v. Storm*, 2 Duer 52; *CONTRA, Cady v. Goodnow*, 49 Vt. 400. Compare *Flemming v. Mulligan*, 2 McCord 173; *Dickerman v. Day*, 31 Iowa 444; *Simpson v. Fullenwider*, 10 Ired. 334; *Cleaden v. Webb*, 4 Houst. 473; *Casebeer v. Kalbfleisch*, 11 Hun 119; *Bly v. Second Nat. Bank*, 79 Pa. St. 453; *Cole v. Hills*, 44 N. H. 227.

V. A partner is bound by a partnership note, although his copartner may have given, or agreed to give, usury therewith. *Dillon v. McRae*, 40 Ga. 107; *Bowers v. Douglass*, 2 Head 376; *Hurd v. Haggerty*, 24 Ill. 171; *Jones v. Jackson*, 14 Ala. 186; see *Machinists Bank v. Krum*, 15 Iowa 49.

VI. A second mortgagee cannot raise such defence. The cases differ as to this. *Pritchett v. Mitchell*, 17 Kan. 355, refers to all the cases which precede it. See also *Warwick v. Dawes*, 11 C. E. Gr. 548; *Price's Appeal*, 84 Pa. St. 141.

O'Neil v. Cleveland.

is insufficient, in that it states that the usurious interest was reserved and taken by the complainants, whereas it appears that the transaction, whatever its legal character, was with one of the complainants only.

The evidence shows that there was but the one executor engaged in the business. His co-executor testifies that she left the whole matter to him and was in nowise engaged or concerned therein. Her precise words are: "I had nothing to do with the business; my son had charge of the transaction; I have no knowledge of the amount for which the mortgage was given." And again: "I am innocent of these things; know nothing about the matter." The making of the loan having been wholly confided by one co-executor to the other, who acted for both, I think the defendants were justified in answering that the loan was reserved and taken by the complainants. There is no evidence tending to show that the defendants were ever advised that the fact was otherwise. They had a right to state, in their answer, the transaction as it presented itself to them, and that was, that, on making the loan, the lenders reserved to themselves illegal interest. It does not appear that the borrower of the

VII. A legatee cannot set it up, in conflict with the direct provisions of the will. *Watson v. McClanahan*, 13 Ala. 57.

VIII. A devisee is entitled thereto. *Handley v. Cunningham*, 12 Bush 401; *Marsh v. House*, 13 Hun 126.

IX. Usury taken by a party is not subject to garnishment in his hands. *Ransom v. Hays*, 39 Mo. 445; *Boardman v. Roe*, 13 Mass. 104; *Barker v. Esty*, 19 Vt. 131.

X. An insolvent assignee or trustee for the benefit of creditors, may set up usury or sue for the penalty. *Beach v. Fulton Bank*, 3 Wend. 573; *Pratt v. Adams*, 7 Paige 639; *Pearsall v. Kingsland*, 3 Edw. Ch. 195; *Green v. Morse*, 4 Barb. 332; *Gray v. Bennett*, 3 Metc. (Mass.) 522; *Tamplin v. Wentworth*, 99 Mass. 63; *Corcoran v. Powers*, 6 Ohio St. 19; *Mallon v. Munson*, 2 Handy (O.) 97; see *Low v. Pritchard*, 36 Vt. 183; *Tooke v. Newman*, 75 Ill. 215; *Thomas v. Watson*, Taney C. C. 297; *Hope v. Smith*, 10 Gratt. 221; *Twynam v. Bingham*, 9 U. C. Q. B. 409.

XI. Also, a receiver. *Palen v. Johnson*, 46 Barb. 21, 50 N. Y. 49; see *Butterworth v. O'Brien*, 23 N. Y. 275; *Curtis v. Leavitt*, 15 N. Y. 85, 86.

XII. Also, an assignee in bankruptcy. *Bosanquett v. Dashwood*, Cas. t. Talb. 113; *ex parte Skip*, 2 Ves. 489; *Brandon v. Sands*, 2 Ves. 514; *Tiffany v. Boatman's Inst.*, 18 Wall. 375; *Moore v. Jones*, 23 Vt. 739; *in re*

O'Neil v. Cleveland.

money, prior to the execution of the mortgage, knew that there was any executor of the estate other than he with whom he was dealing, nor that the illegal interest was reserved or taken for the benefit of one executor more than another.

It is again said that there is a variance between the answer and proof, because the former alleges that the sum retained was fifteen per cent., whereas it appears that it was, at most, but fourteen per cent., Davis having retained one per cent. for his commissions. But the evidence shows that the contract was, that the borrower was to pay a bonus of fifteen per cent. True, it was made through Davis, but was with the lenders, and the proportions in which the amount retained was divided between them, is immaterial. The answer correctly states, that the illegal interest reserved was fifteen per cent. of the \$2,225.

The contract, as proved, was simply that the borrower should pay fifteen per cent. for the use of the money beyond the legal interest. The complainants, therefore, fail in their contention on this point.

The complainants' next contention is, that there was no usury in fact. It is insisted that, the estate having advanced

Prescott, 5 Biss. 523; *Receiver v. Wild*, 10 Nat. Bk. Reg. 568; *Woolfolk v. Plant*, 46 Ga. 422; *Wheelock v. Lee*, 15 Abb. Pr. (N. S.) 24, 64 N. Y. 242; *Crocker v. First Nat. Bk.* 3 Cent. L. J. 527; *Wright v. First Nat. Bk.*, 6 N. Y. Weekly Dig. 543; *Williar v. Baltimore Ass'n*, 45 Md. 546; see, however, *Bromley v. Smith*, 2 Biss. 511; *Nichols v. Bellows*, 22 Vt. 581.

XIII. Also, bail to the action. *Anonymous*, 12 Mod. 493.

XIV. Also, a lunatic's trustees. *Lockwood v. Mitchell*, 7 Ohio St. 387.

XV. An attorney or agent is personally liable for the penalty, and it is no defence that the money belonged to another person (*Wells v. Garland*, 2 Va. Cas. 471; *Owen v. Barrow*, 4 Bos. & Pul. 101; *Toole v. Stephen*, 4 Leigh 581; *Baxter v. Buck*, 10 Vt. 548; *Commonwealth v. Frost*, 5 Mass. 53; *Kimball v. Boston Athenæum*, 3 Gray 225, 231; *Reg. v. Walker*, 2 Keb. 531; *Wyllis v. Ault*, 46 Iowa 46; *Wilkes v. Coffield*, 3 Hawks 28); but in an action by the principal on the usurious instrument, the borrower may plead the usury taken by the agent (*Pearson v. Bailey*, 23 Ala. 537; see *Jones v. Herndon*, 7 Ired. 79; *Hogan v. Hensley*, 22 Ark. 413).

XVI. Usury taken by a *feme covert* is sufficient at common law to avoid the bond, but not to charge her husband *criminaliter*. *Barnet v. Tompkins, Skin.* 348. How far usury in a mortgage executed by her affects her dower, see *Cain v. —*, 36 Ala. 168; *Campbell v. Babcock*, 27

O'Neil v. Cleveland.

to the mortgagor's agent the whole amount for which the mortgage was given, the illegal receipt or retention of excessive interest, brokerage or commissions by the agent who effected the loan, cannot affect the principal. The rule upon this subject is clearly enunciated by this court in the case of *Muir v. Savings Bank*, 1 C. E. Gr. 537. It is, "If an agent, in making a loan of money, accept from the borrower a bonus beyond the legal rate of interest, such act of the agent will not render the contract usurious if the bonus was taken without the knowledge of the principal and was not received by him."

The effort, on the part of the complainants, seems to be to induce the court to believe that, by arrangement between O'Neil and Davis, the latter was to retain for his commissions fifteen per cent. of the \$2,225, and that, having secured to himself this amount as the outcome of his contract with O'Neil, he, without being under any sort of promise or obligation so to do, voluntarily surrendered fourteen-fifteenths of it to the person from whom he had received it. This does not appear to be the true character of the transaction. It appears from the evidence, that Davis, the agent, though first applied to by the borrower, acted for both parties.

Wis. 512; *Payne v. Burnham*, 62 N. Y. 69; *Kelley v. Lewis*, 4 W. Va. 456; *Norwood v. Morrow*, 4 Dev. & Bat. 442.

XVII. A sheriff or constable exacting usury from an execution debtor, is liable for the penalty. *Dowell v. Vannoy*, 3 Dev. 43 [see *Wright v. McGibbon*, 2 Dev. & Bat. 474]; *Wright v. Elliott*, 1 Stew. (Ala.) 391.

XVIII. A guardian is individually liable for usury taken on investments of her ward's money. *Stone v. McConnell*, 1 Duv. 54; see *Beasley v. Watson*, 41 Ala. 234.

XIX. The liability of an executor or administrator is shown in the following cases: In *Heasley v. Dunn*, 5 B. Mon. 145, an administrator exacted and received usury on a note payable to his intestate.—*Held*, that he was personally liable to the payers of the note, in an action of *assumpsit* to recover the usury, notwithstanding he had accounted to the estate for such usury. Also *Proctor v. Terrill*, 8 B. Mon. 451.

In *Heath v. Cook*, 7 Allen 59, an executor foreclosed a mortgage of his testator, which, without his knowledge, was usurious. The mortgagors paid off the mortgage to him, and he accounted therefor.—*Held*, that an action for the penalty for taking usury could not be maintained by the mortgagors against the executor, if he received the amount *inno-*

O'Neil v. Cleveland.

Though the reservation of illegal interest is directly charged, by way of defence, in the answer, and both executors have been sworn and examined as witnesses in the case, it is not denied by either of them, nor by Davis, who was also a witness in the case, that there was an arrangement or understanding prior to the completion of the negotiation for the money, that the borrower was to pay, for the use of it, a bonus beyond the legal interest. Was it to be paid to Davis or to his principal? The evidence of Davis very satisfactorily settles this point. He says: "This fifteen per cent. was for getting the money; Mr. O'Neil couldn't get the money anywhere; he would give it, and was glad to get it; I don't think that was pay for my services in getting the money; don't think I would charge anybody fifteen per cent. to get the money." The repayment so promptly of the fourteen per cent. to the executor, in connection with the evidence of Davis just quoted, and with all the other facts and circumstances of the case, clearly shows that the money was loaned on the agreement that fifteen per cent. should be reserved for the use of the person or persons making the loan.

cently. See *Ossipee v. Gafney*, 56 N. H. 352, to the same effect. Compare *Massey v. Massey*, 2 Hill's Ch. 492; *Ellis v. Warnes*, Mo. 752.

In *Wells v. Chapman*, 4 Sand. Ch. 313, 13 Barb. 561, trustees having paid usury, were deemed capable of waiving the penalty for the benefit of the estate.

In *Steele v. Franklin*, 5 N. H. 376, an administratrix took up an usurious note given to her intestate, by taking another note to herself for the amount, which also included further usury.—*Held*, that the mere substitution of the latter note was no defence to the usury of the first one, and that she must also deduct from her own note the penalty for usury in that state, three times the sum which she herself had exacted.

In *McCoy v. Stranathan*, 24 Ohio St. 486, W. and J. were the executors and legatees of S., and as such exacted usury from S.'s debtor, who discharged his obligation by a new note to W., which was taken by W. on account of his legacy. In a suit thereon—*Held*, that the debtor could not set up the usury, although it had been received by W. as executor.

In *Ewing v. Griswold*, 43 Vt. 400, it was held that a defendant who had paid usury to an executor on his testator's note, could set off such usury in an action by the executor thereon.

In *Norcum v. Lum*, 33 Miss. 299, a sole administrator loaned moneys of the estate at usurious rates.—*Held*, that the representatives of the

O'Neil v. Cleveland.

It is, however, insisted that the bonus, if any there was, was to be, and in point of fact was, paid to the executor who was engaged in making the loan, and his receipt of it does not affect the security in the hands of the executors of the estate, of which he is but one. In other words, the contention is, that the executor advanced the money in his official or representative capacity, and, as a private individual, for his own personal use and benefit, received part of it back, and therefore there can be no usury which can affect the estate for which he acted in making the loan, but for which he did not act when he took the bonus. I have not been able to perceive what, in legal principle, was the difference between the position of the lender when, on the 27th of May, he gave his check to Davis, and that which he occupied when he received Davis's check, on the 3d of June next following. Having regard to what is shown to have been the arrangement on which the loan was made, I am not aware of any principle of law or equity by which it can be held that the lender was, on the day he advanced the money, acting in his official or representative capacity, and that, on the day of the receipt of the bonus, he was but a private

borrower could enjoin a sale of lands under a deed of trust to secure such loans, and could deduct therefrom the excess.

In *Gordon v. West*, 8 N. H. 444, a testator held a deed of lands by way of security, for \$4,000 loaned to J. and W. They agreed to give the executor \$500 to accept the full amount of the debt and interest, and to reconvey the lands to them.—*Held*, on exception to his account, that the executor was entitled to retain the \$500, whether it be deemed usury or a bonus.

In *Killen v. Sistrunk*, 7 Ga. 283, and *Beale v. Blake*, 10 Ga. 449, it was held that the legatees of an estate may call the executors to an account for usury received by them from investments of the funds of the estate. See also *Watson v. McClanahan*, 13 Ala. 57.

If usury has been taken by a decedent in his life-time, the right of recovery is, of course, against his estate (*Roberts v. Burton*, 27 Vt. 396; *Proctor v. Terrill*, 8 B. Mon. 451; *Little v. Riley*, 43 N. H. 109; *Brockenbrough v. Spindle*, 17 Gratt. 21; *Persons v. Hight*, 4 Ga. 474; *Bosanquett v. Dashwood*, Cas. t. Talb. 113); nor will such right be lost by a new note given to his representative. *Brent v. Tivebaugh*, 12 B. Mon. 87; *Smith v. Broyles*, 15 B. Mon. 461; *Little v. White*, 8 N. H. 276.

In *King v. Murray*, 6 Ired. 62, A., the legal owner of lands, leased them to B., who was indebted to A., and might redeem at any time for \$1,000, B. meanwhile paying a rent larger than the interest on \$1,000.

O'Neil v. Cleveland.

individual, whose receipt of the stipulated bonus was but as the act of a stranger. If it were otherwise, a very simple contrivance would, in very many cases, most effectually enable parties to evade the usury laws. Looking, as we are required to do, at the substance, and not simply at the form, of the transaction, it appears to be, that the mortgagee borrowed of the estate of Cleveland a certain amount, and agreed to pay, for the use of it, a bonus beyond the legal interest. It can make no difference that the lender, in the first place, paid over the whole amount to the borrower, and then received back, by another name, style, title or description, the agreed bonus. This is not the case of an agent who, without the knowledge or consent of his principal, secures to himself a bonus for effecting a loan. In the case before us, the lender secured the illegal interest to himself, and to say, as suggested, that it was but a commission for making the loan, and not usury, does not, in my opinion, under the circumstances, correctly characterize the case.

Nor do I see how the case is relieved of the defence of usury by the fact that the lender was but one of the two executors of the estate for which he acted. The funds loaned were in his hands, and subject to his individual check. His co-executor, it seems, committed to him the entire business of making the investment. If he saw fit to reserve to himself, either on his own private account or in his representative character, illegal interest, the transaction is tainted with usury, and the executors have no equitable claim to hold the security free of such taint. They must take it *cum onere*. Whether the executor who made the

In ejectment by the *heirs* of A. to recover the lands,—*Held*, that B. was estopped, as against them, from setting up usury in the lease. See *People v. Howlett*, 13 Hun 138; *Davis v. Cunningham*, 10 Ired. 156.

For the rule when usury has been *paid* by a decedent, and the proper remedies thereon, see *Rankin v. Rankin*, 1 Gratt. 153; *Martin v. Lindsay*, 1 Leigh 499; *Pugh v. Cameron*, 11 W. Va. 523; *Edwards v. Skirving*, 1 Brev. 548; *Scott v. Nesbit*, 2 Bro. C. C. 641. If waived by a decedent it cannot afterwards be set up by his representatives. *Berrington v. Evans*, *Young* 276.—REP.

Wilson v. Bellows.

loan is entitled to retain, as against the estate, the bonus he received, is a question between him and those whom he represents.

The defendants, having succeeded in proving the defence of usury, are entitled to a reversal of the decree below. The complainants are entitled, under the statute, to a decree, without interest or costs, for the sum advanced (\$2,225), less the fifteen per cent. retained.

Decree unanimously reversed.

JACOB WILSON and others, appellants,

v.

SARAH BELLOWS and others, respondents.

1. A deed to purchasers under a judgment and sale made by an auditor in attachment, cannot be avoided on the ground of false claims by creditors, and an irregular, fraudulent and inadequate sale, without making the creditors and auditor parties.

2. This defect, in not joining proper parties, is good ground for demurrer, where it appears on the face of the bill.

3. When the purchasers are not charged with fraud, relief against them will only be granted on equitable terms; such as offering to refund the purchase-money. They will not be compelled to look to others who are not parties to the bill.

On appeal from a decree of the chancellor, reported in 3 *Stew.* 124.

Mr. B. A. Vail, for appellants.

Mr. S. D. Dillaye, for respondents.

SCUDDER, J.

The bill of complaint in this cause is filed by Sarah Bellows, widow, Charles W. Bellows, Harriet L. Bellows

Wilson v. Bellows.

and Henrietta Bellows, children of George F. Bellows, deceased, against Jacob Wilson and George Graham, who bought certain real estate of the complainants at a sale made by George W. Thorne, auditor, under judgment in foreign attachment, in the circuit court of Middlesex county, at the suit of Benjamin Collins and Sarah J. Kortright, administrators with the will annexed, of Nicholas G. Kortright, deceased, against the defendants.

The bill charges that the plaintiffs in attachment were not administrators by appointment of any court or surrogate in the state of New Jersey, and had no authority to bring such action: that the debt claimed in said suit was not due, and owing to them; that the proceedings were secretly conducted, and the judgment and sale were a surprise to the complainants; that three tracts of land were sold, in gross, for a greatly inadequate price, and that the said proceedings were fraudulently and willfully concealed from them by the plaintiffs and claimants in attachment; that the deeds to the defendants Jacob Wilson and George Graham, who purchased under said proceedings, are recorded in the clerk's office of the county of Middlesex, and are a cloud on the title of the land.

They pray that the exact situation of the claims made by the administrators of the estate of Nicholas G. Kortright, deceased, and of Nathan V. Compton, an applying creditor in attachment, may be shown; that the proceedings in attachment may be set aside and declared void; that the deeds given by the auditor in attachment may be declared to be void, and the defendants enjoined from selling or encumbering said lands.

To this bill of complaint the defendants filed a general demurrer, which was overruled, with costs. From this decree the appeal is taken.

The decree is founded on the facts set forth in the bill of complaint, which are taken to be true on the demurrer. There is strong ground for equitable relief presented in the bill, if the facts be true as there stated, but the difficulty is

Wilson v. Bellows.

presented in determining those facts by the absence of parties whose names appear on the face of the bill.

The only defendants are the purchasers at the auditor's sale of lands, while the administrators of Nicholas G. Kortright, deceased, whose authority to bring the suit is disputed, and Nathan V. Compton, the applying creditor in attachment, both of whose claims of debt are denied, and whose judgment is declared to be void; and the auditor, who is charged with an irregular and fraudulent sale—are not made defendants in the action. The judgment and sale cannot be avoided unless they are made parties, and the purchasers at the sale, who alone are charged in the suit, are entitled to the answer of these other parties in defence of their title.

All persons interested in the subject-matter of a suit, and who are necessary to the protection of other parties therein, must be made parties, for the decree should be conclusive upon all persons interested, and to make it so all such should be brought in to answer. *Hicks v. Campbell*, 4 C. E. Gr. 183; *Pence v. Pence*, 2 Beas. 257; *Keeler v. Keeler*, 3 Stock. 458. In the cases cited by the complainants' counsel, on the merits of the bill, it will be found that this rule has been observed. Usually the purchaser at sheriff's sale has been the plaintiff in execution, and has been joined with the sheriff, if a charge is made against him of fraud in the sale. This was done in *Tiernan v. Wilson*, 6 Johns. Ch. 410, where the plaintiff in the judgment, the sheriff, and the purchaser were all joined, and the sheriff was decreed to pay costs for his very gross negligence and abuse of trust in making the sale of the complainant's property; while in *Johnson v. Garrett*, 1 C. E. Gr. 31, where there was no actual fraud in the auditor or purchaser, neither was condemned in costs.

There can be no question that this defect in joining proper parties can be taken advantage of by demurrer, where it appears on the face of the bill, as it does in this case. 1 *Dan. Ch. Pr.* 334; *Story's Eq. Pl.* § 541; *Melick v. Melick*, 2 C. E. Gr. 156.

There is another material defect in the bill. It is not charged that the defendants who purchased at the sale of

Gale v. Morris.

the auditor in attachment, were guilty of any fraud, or had any knowledge of a false claim made by the plaintiffs in attachment, or any irregularity in their proceedings. For aught that appears, they were *bona fide* purchasers. If so, the complainants, whatever equity they may have against other parties, can only ask that the sale to those purchasers be set aside and their deeds avoided, when they offer to refund the money that has been paid for the property. They cannot be compelled to look to others, who are strangers to them and are not made parties to the suit, for repayment of the purchase-money.

In *Tiernan v. Wilson* and *Johnson v. Garret*, all parties interested were brought in, and a tender of the sum paid for the property was made. Relief in such cases will only be given on equitable terms.

As the bill now stands, a court of equity can make no decree, nor give the complainants any relief. The decree should be reversed, with costs, and the cause remitted, so that amendments may be made in the bill to present properly the case of the complainants.

For reversal—BEASLEY, C. J., DEPUE, DIXON, REED, SCUDDER, VAN SYCKEL, WOODHULL, DODD, GREEN—9.

For affirmance—KNAPP—1.

GEORGE H. GALE and others, executors, appellants,

v.

DEWITT C. MORRIS and others, respondents.

A mortgagor intended to give, and the mortgagee expected to receive, a mortgage in fee, but, for want of words of inheritance, the mortgage, as executed, conveyed only an estate for life. A second mortgagee had such actual notice of the first mortgage as induced the belief that it was a mortgage of the fee, and, so believing, took the second mortgage. *Held*, that, as against the second mortgagee, the first mortgage should be regarded as a mortgage of the fee.

Gale v. Morris.

On appeal from a decree of the vice-chancellor, reported in 2 *Stew.* 222.

Mr. Bentley and *Mr. Williamson*, for appellants.

Mr. Alward, for respondent.

DIXON, J.

On May 20th, 1873, D. W. C. Morris executed to the complainants a mortgage upon lands in Hudson county, to secure payment of \$12,000. The instrument was prepared by a member of the New York bar, who erased the printed word "heirs," in the granting and *habendum* clauses of the mortgage, and, as the mortgagees were described as executors, substituted for it the word "successors," thus causing it to convey, by its terms, only a life-estate. On the day of its execution, the mortgage was entered upon the records of Hudson county, but whether registered or recorded in full, does not appear. On December 27th, 1875, Morris mortgaged the same lands, in fee, to Hannah Bellamy (now Mrs. Briggs), to secure \$4,000. Afterwards the complainants filed their bill in chancery, against Morris and Mrs. Briggs, to have their mortgage established as a mortgage of the fee, and to have a sale of the premises for its satisfaction, and charged that Mrs. Briggs took her mortgage with full knowledge of the complainants' mortgage, and of the agreement that it was to convey a fee, and with the belief and understanding that the premises were mortgaged in fee to them; and they insisted that her mortgage was second to theirs upon the fee of the land.

The bill calls for the answer of the defendants, under oath. Mrs. Briggs answers, in very general and very meager terms, "that she has no knowledge or information of any of the matters in said bill charged, nor any belief thereof, except such as she may hereafter set up; and she denies that she took [her mortgage] with the knowledge that any other estate than that stated in the record of the

Gale v. Morris.

mortgage to the complainants was intended to have been vested in the complainants by said mortgage to them, or that the same was intended to have been upon the fee of the lands.”

All parties concede that the complainants' mortgage was intended to cover the fee, and that its reformation to that end is entirely proper as between the parties to it. The only question raised is as to the propriety of such an alteration against Mrs. Briggs. On this point the vice-chancellor found in favor of the complainants, and from that decision Mrs. Briggs appeals.

The substantial ground of contention is the character and effect of the notice which the second mortgagee had of the first encumbrance.

W. L. M., the draughtsman of both mortgages, and the counsel of Mrs. Briggs at the time, being called as a witness for the complainants, in April, 1877, stated that at the time he drew the complainants' mortgage he considered it embraced the fee, and only latterly discovered what he styles “the very singular adjudication in New Jersey” ruling otherwise. Evidently this novel view of the law dawned upon him after the second mortgage was made. He further alleged that it was proposed and assented to by D. W. C. Morris that a second mortgage should be executed by him to Mrs. Bellamy on certain property on which it was stated there was a pre-existing mortgage of \$12,000; that in a conversation he had with Mrs. B., she expressed the desire that such a mortgage should be drawn; that he stated to her at that time what he considered the value of the property (\$30,000 to \$40,000), the amount of the mortgage to the complainants (\$12,000), and that her mortgage would be a second mortgage, and he says that he unquestionably mentioned to her what the previous encumbrance was, but he did not state to Mrs. B., at the time of giving her the mortgage, that the complainants' mortgage was any greater than it appears on its face.

Gale v. Morris.

The complainants' mortgage was not at hand in any of these interviews, and clearly such information as the witness gave Mrs. B. concerning it, was based on his understanding at the time, and it cannot, therefore, be presumed to have been likely to lead her to the belief that it covered only a life-estate, or any estate less than a fee-simple.

Mrs. Briggs was sworn before a master as a witness in her own behalf, and was asked by her counsel about certain matters which transpired when Mr. Morris gave her the \$4,000 mortgage. On cross-examination, the complainants' counsel asked her whether, when she took the mortgage, W. L. M. told her that Mr. Gale had a mortgage on the property, and whether she then knew that she was taking a second mortgage, and whether W. L. M. did not then tell her that her mortgage would be subsequent to Mr. Gale's mortgage for \$12,000. These questions were objected to by the counsel of Mrs. B. as not cross-examination, and, though pressed, she, by the advice of her counsel, declined to answer them. The objection was ill-founded. The complainants were entitled to inquire from Mrs. B. all that had transpired, material to the issue and in her presence, at the interview of which she had, on examinations-in-chief, detailed some particulars. Her refusal to respond strengthens into conviction the suspicion which the formal answer to the bill engenders, that concealment was more to her interest than discovery, and justifies the strongest inferences against her, touching the subject of investigation. The pleadings and the proof satisfy the court that when Mrs. B. took her mortgage she knew of the complainants' mortgage, and believed it to be as comprehensive as her own; she understood it to embrace the fee-simple.

But this defendant further insists that conceding her notice to have been as broad as we think it was, yet such notice establishes against her only those facts which she would have ascertained by reasonable inquiry consequent upon the notice, that such inquiry would have led to only an examination of the complainants' mortgage, and that examination

Gale v. Morris.

would have shown that their lien covered no more than a life-estate.

To this contention two replies may be urged. First, if the rule be that notice, which puts one on inquiry, charges him with knowledge of only such facts as reasonable investigation will disclose, yet it might well have happened in this case that due investigation would have brought to light the fact of a mistake in the complainants' mortgage. The word "successors" following the description of the complainants, as executors, would of itself, probably, to the common mind, and perhaps to the legal mind, suggest the idea that the mortgagor intended to encumber more than an estate for life. The probability of this suggestion would be heightened if the mind started with the impression (which we think was conveyed to this defendant) not merely that there was a mortgage, but that there was a mortgage of the whole estate. If this idea had been in fact suggested, it would have been the duty of the inquirer to pursue it, and that, in the present case, would inevitably have led to a knowledge of the truth. Either the complainants, or the mortgagor, or her own counsel, would have informed Mrs. Briggs, for the asking, that the mortgage was intended to encumber the fee.

But, secondly, I think the rule, as applicable to the facts now before us, is not correctly stated in this contention of the defendant. The rule, so stated, has reference to those facts which lie outside of the notice itself, but which would be learned by such inquiry as a prudent man would make in consequence of the notice. If the party notified make reasonable investigation, he obtains actual knowledge of these facts; if he choose not to make it, he is charged constructively with knowledge of them. The rule merely prohibits him from taking advantage of his own imprudence to the detriment of another. But as to the matters that lie within the notice, the principle assumes another form. It charges the party with knowledge of those matters, so far as reasonable inquiry has not dissipated their credibility. If he is

Gale v. Morris.

unwilling to act upon the facts as the notice presents them, then the law demands that he shall make proper examination, and upon the result of that examination he may safely stand. *Williamson v. Brown*, 15 N. Y. 354. But if he prefer not to examine, it must be because he is satisfied to act as if the matters disclosed in the notice were true, and he cannot afterwards complain if his rights are made to rest upon them so far as they are true. The information given by the notice is equivalent to that obtained by inquiry. Nor, to one relying upon the notice alone, is it of any consequence that the rights indicated by it are mentioned as legal rights, when, in fact, they are equitable merely. As a guide for examination in pursuance of the notice, such a circumstance may be material; for the party, being informed only of a legal title, may fairly rest when he has ascertained the extent of that title, no other claims being suggested. As, for example, in this case, if Mrs. Briggs, having notice broad enough to cover a mortgage in fee, had obtained inspection of the mortgage or its record, and had thereupon reasonably concluded that it encumbered only an estate for life, it would be impossible to say that she had not used due diligence in research, and would not be, in conscience as in law, justified in resisting the claim of the complainants to extend their mortgage beyond its terms. But as she took her mortgage under the belief that the complainants were entitled to a prior lien upon the fee, and as the complainants were, in fact, so entitled, it is manifestly against conscience for her to seek to abridge their rights so as to enlarge her own, merely because she believed their title was both legal and equitable, and it turns out to have been equitable only. In such cases the equitable title is the substance, the legal title is but the form; and it has long been settled that, as against those having notice of the substance, courts of equity will maintain that, regardless of the form. *Finch v. Earl of Winchester*, 1 P. Wms. 277; *Le Neve v. Le Neve*, 1 Lead. Cas. in Eq. *35; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Rutgers*

Jewett v. Dringer and Bowman.

v. *Kingsland*, 3 *Hal. Ch.* 658; *Weller v. Rolason*, 2 *C. E. Gr.* 13.

The decree of the chancellor should be affirmed.

Decree unanimously affirmed.

HUGH J. JEWETT, receiver of the Erie Railway Company,
appellant,

v.

SIGMUND DRINGER and HENRY BOWMAN, respondents.

1. If a party having charge of the property of others, so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produced it, and it is for him to distinguish his own property or lose it.

2. A junk dealer, by fraudulent collusion with the employes of a railroad corporation, obtained large quantities of old iron &c. at much less than the actual weight or value. On delivery it was thrown indiscriminately on other heaps of old iron &c. belonging to him, so as to be indistinguishable.—*Held*, that he must forfeit the whole mass to the company.

On appeal from a decree of the vice-chancellor, reported in *Jewett v. Dringer*, 2 *Stew.* 199.

NOTE.—To work a forfeiture of the whole mass, where one has confused his own goods with those of other persons, two things are requisite, (1) that the confusion be made fraudulently, and (2) that after such confusion the articles be incapable of identification or appropriation.

I. *No forfeiture is caused by an involuntary mixture or accession.*

If A. turn his sheep among B.'s, A.'s creditors cannot levy on B.'s part of the whole flock (*Kingsbury v. Pond*, 3 *N. H.* 513; see *Willey v. Cox*, 25 *Mich.* 116); nor, by cattle being confounded and driven away with others on the highway (*Young v. Vaugh.*, 1 *Houst.* 331; *Brooks v. Olmstead*, 17 *Pa. St.* 24; *Brownell v. Flagler*, 5 *Hill* 282; *Van Valkenburgh v. Thayer*, 57 *Barb.* 196; *Wellington v. Wentworth*, 8 *Metc. (Mass.)* 548; *Brown v. Boyce*, 68 *Ill.* 294). Where cattle trespassing mingled with those of the plaintiff, and communicated to them a dangerous disease,—*Held*, admissi-

Jewett v. Dringer and Bowman.

Mr. R. Wayne Parker and Mr. Cortlandt Parker, for appellant.

Mr. T. N. McCarter and Mr. S. Tuttle, for respondents.

DODD, J.

Hugh J. Jewett, the complainant in this suit, was appointed, in May, 1875, receiver of the Erie Railway Company, and as such receiver filed his bill of complaint, in April, 1876, against the defendants, Sigmund Dringer and Henry Bowman. Dringer was a junk dealer in the city of Paterson, and began, in April, 1873, to buy, of the company, old iron or waste material, and continued so to do to within a few days before the filing of the bill. The defendant, Bowman, was the company's purchasing agent, and had also the further duty of making sales of the waste materials, of which large quantities were constantly being accumulated at the company's shops in Jersey City, Susquehanna, Elmira and elsewhere. The bill charged both defendants with fraud

ble as affecting the damages (*Anderson v. Buckton*, 1 Str. 192; *Barnum v. Van Dusen*, 16 Conn. 200; see *Jeffrey v. Bigelow*, 13 Wend. 518; *Cooke v. Waring*, 2 H. & C. 332; *Mullett v. Mason*, L. R. (1 C. P.) 559). Pelts piled by a debtor on those of another, will not render the latter's pelts liable to the former's creditors (*Gillman v. Hill*, 36 N. H. 311); or, pork and lard so commingled (*Huff v. Earl*, 3 Ind. 306; see *Buckley v. Gross*, 3 B. & S. 566); or, grain (*Starr v. Winegar*, 3 Hun 491; *Low v. Martin*, 18 Ill. 286; *Nowlen v. Colt*, 6 Hill 461; *Seymour v. Wyckoff*, 10 N. Y. 213; *Lewis v. Whittemore*, 5 N. H. 366; *Wilson v. Nason*, 4 Bosw. 155; *Samson v. Rose*, 65 N. Y. 411; *Kauffmann v. Schilling*, 58 Mo. 218; *Rahilly v. Wilson*, 3 Dill. 420; *Sims v. Glazener*, 14 Ala. 695; *Inglebright v. Hammond*, 19 Ohio 337; *Morgan v. Gregg*, 46 Barb. 183; *Pierce v. O'Keefe*, 11 Wis. 180; *Adams v. Meyers*, 1 Sawy. 303; 6 Am. Law Rev. 450; *Thompson v. Conover*, 1 Tr. 329, 3 Tr. 466; *South Australian Ins. Co. v. Randall*, L. R. (3 P. C.) 101; *Johnston v. Brown*, 37 Iowa 200); or, oil in tanks (*Wilkinson v. Stewart*, 85 Pa. St. 255); or, hay (*Stock v. Stock*, Poph. 38; *Robinson v. Holt*, 39 N. H. 563); or, earth taken from the plaintiff's land (*Riley v. Boston Water Power Co.*, 11 Cush. 11; see *Mather v. Trinity Church*, 3 Serg. & R. 509; *Muzzey v. Davis*, 54 Me. 361; *Connecticut R. R. v. Holton*, 32 Vt. 43; *Northam v. Bowden*, 11 Exch. 70; *Higgon v. Mortimer*, 6 Car. & P. 616); or, if the confusion be caused by the action of a freshet (*Moore v. Erie Railway Co.*, 7 Lans. 42; *Sheldon v. Sherman*, 42 Barb. 368, 42 N. Y. 484; see *Gentry v. Madden*, 3 Ark. 127; *Washburn v. Gilman*, 64 Me. 163; *Rogers v. Judel*, 5 Vt. 223; *Foster v. Juniata Bridge*

Jewett v. Dringer and Bowman.

in these purchases of Dringer, alleging in particular one transaction in which seventeen hundred tons of old car-wheels were obtained for nineteen dollars per ton instead of twenty-two dollars per ton, and further alleging in general that large amounts of material had been delivered to Dringer fraudulently, by the connivance of Bowman, of which no account had been rendered to the company, and for which nothing had been paid. Discovery and account were prayed for from both defendants; also a writ of *ne exeat* against Bowman and an injunction against Dringer restraining him from disposing of such material. Both writs were issued on the filing of the bill and affidavits. The answer of Dringer was filed April 25th, 1876.

On the 4th of May, 1876, a petition was filed by the receiver, setting forth that discoveries of additional fraudulent transactions had been made since the filing of the bill, specifying the same, and praying that a receiver might be appointed to take possession of the material in Dringer's yards, and, on the 24th of the same month, E. N. Miller was

Co., 16 Pa. St. 393); or, by a tempest (*Spence v. Union Ins. Co.*, L. R. (3 C. P.) 427; see *Barker v. Bates*, 13 Pick. 255; *Whitwell v. Wells*, 24 Pick. 25; *Proctor v. Adams*, 113 Mass. 376; *Rogers v. Gilinger*, 30 Pa. St. 185; *Jones v. Moore*, 4 Y. & C. 351, 356; but see, also, *Buckout v. Swift*, 27 Cal. 433; *Waterman v. Dutton*, 6 Wis. 265, 276); or, by the effect of a fire (*Buckley v. Gross*, 3 B. & S. 566; see *Pope v. Garrard*, 39 Ga. 471; *Curry v. Schmidt*, 54 Mo. 515); or, by any natural cause (*State v. Burt*, 64 N. C. 619; see *Salisbury v. Herchenroder*, 106 Mass. 458; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle 9; *Broom's Max.* 171).

In *Hill v. Robison*, 3 Jones (N. C.) 501, ten sacks of salt were bought and paid for by B. with the funds of A., and at the same time B. bought and paid for five sacks with his own funds; all the sacks were delivered to him unmarked, and, without separating any of them, B. delivered all of them to C., his creditor, with instructions to deliver ten of them to A. C. converted them all to his own use.—*Held*, that A. could not maintain trover against C., because he could show title to no specific property.

In *D'Eyncourt v. Gregory*, L. R. (3 Eq.) 382, certain tapestries bought by a testator, but hung, after his death, by the tenant in tail, were held not to have become annexed to the realty, but to belong to the executor.

In *Sharp v. United States*, 12 Ct. of Cl. 638, large quantities of cotton belonging to different owners, had been captured by the federal army; part of it was destroyed, part used, and all marks to identify the

Jewett v. Dringer and Bowman.

appointed such receiver. Upon arguments afterwards had before the chancellor on the several answers of Bowman and Dringer, the writ of *ne exeat* was discharged, and the motion on behalf of Dringer to have the injunction and receivership set aside, was denied. Afterwards, and before the taking of the evidence, the bill of complaint was amended, and new answers were filed by the defendants.

The matters of fact asserted by the complainant, and to which the evidence was directed, are included in the general statement that the defendant, Dringer, obtained from the employes of the company, under the pretence of purchases, large quantities of waste material far beyond the amounts actually purchased, and also that, under the pretence of purchasing one class of material, he possessed himself of another class, superior in quality and value to that accounted for, thus defrauding the company both in the weights and the character of the material obtained; and that Bowman, during the time he was purchasing agent, was the principal one of the company's employes responsible for the fraud.

remainder lost.—*Held*, that each owner was entitled to his proportion of the remainder.

An owner of trees does not lose his property by a trespasser converting them into timber (*Mo.* 20; *Pierrepoint v. Barnard*, 5 Barb. 364; *Final v. Backus*, 18 Mich. 218); or, into rails and posts (*Snyder v. Vaux*, 2 Rawle 423; *Millar v. Humphries*, 2 A. K. Marsh. 446); or, into railroad ties (*Smith v. Gouder*, 22 Ga. 353; *Lake Shore R. R. v. Hutchins*, Sup. Ct. Ohio, Dec. 1877, 6 Cent. L. J. 436); or, into staves (*Heard v. James*, 49 Miss. 236); or, into fire-wood (*Halleck v. Mixer*, 16 Cal. 574; *Moody v. Whitney*, 34 Me. 563; *Brewer v. Fleming*, 51 Pa. St. 102); or, into shingles (*Betts v. Lee*, 5 Johns. 348; *Chandler v. Edson*, 9 Johns. 362; *Rice v. Holtenbeck*, 19 Barb. 664; see *Rockwell v. Saunders*, 19 Barb. 473; *Bennett v. Thompson*, 13 Ired. 146); or, into a flat-boat (*Burris v. Johnson*, 1 J. J. Marsh. 196; but see *Potter v. Mardre*, 74 N. C. 36); or, saw-logs into boards (*Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; *Davis v. Eastley*, 13 Ill. 192; see *Pierce v. Schenck*, 3 Hill 28; *Gregory v. Stryker*, 2 Denio 628); or, a raft of logs into fire-wood (*Eastman v. Harris*, 4 La. An. 193); or, wood into coal (*Riddle v. Driver*, 12 Ala. 590; *Curtis v. Groat*, 6 Johns. 169); or, corn into whisky (*Silisbury v. McCoon*, 3 N. Y. 379, 4 Denio 332); or, hides into leather (*Hyde v. Cookson*, 21 Barb. 592; see *Salmon v. Horwitz*, 2 Am. Law Reg. 640); or, hides deposited in vats (*Bond v. Ward*, 7 Mass. 123; see *Brakely v. Tuttle*, 3 W. Va. 86); or, leather converted into saddles (*Dunn v. Oneal*, 1 Sneed 106; in this case, however, there was a bailment; see *Arnott v. K. P. R.*, 19 Kan. 95). Oil

Jewett v. Dringer and Bowman.

The material in question consisted of old iron, brass, copper, lead, zinc and white metal. Of some of these there were several varieties, differing in solidity and value; such as car-wheels, axles, tires, grate-bars, castings, machinery, boiler-scrap, tanks, ash-pans, etc. A large part of what was obtained by Dringer was denominated *wrot* scrap, which is also classified under several heads in quality and value. The material said to have been fraudulently obtained by Dringer came almost entirely from the company's shops at Susquehanna, though material purchased by him was sent also from the shops at Jersey City, Elmira and Port Jervis. The goods were sent in the company's cars, loaded and weighed at the shops by the company's employes. The cars are open boxes of nearly uniform size. At Susquehanna the employe who marked in the yard the weight of the car before and after being loaded, took his memorandum thereof to the store-room and entered the weights in the blotter, from which another employe made up the shop-book. Bills of the same as vouchers were then made and sent to the pur-

taken from wells is not lost to the land-owner by a trespasser merely carrying it away in his own barrels (*Hail v. Reed*, 15 B. Mon. 479).

A trespasser, by building a house on lands of another, loses the house (*Ewell on Eject.* 57, *et seq.*; *Waterman on Trespass*, § 681; also, *Bonney v. Foss*, 62 Me. 248; *Mathes v. Dobschutz*, 72 Ill. 438; *Cannon v. Hare*, 1 Tenn. Ch. 22; *Poor v. Oakman*, 104 Mass. 309; *Beers v. St. John*, 16 Conn. 322; *Waterman v. Dutton*, 6 Wis. 265; *Rogers v. Woodbury*, 15 Pick. 156; *Holtzapfel v. Phillebaum*, 4 Wash. C. C. 356; see *McKissey v. Armour*, 2 Stock. 115; *Wall v. Osborn*, 12 Wend. 39; *Leland v. Gassett*, 17 Vr. 403; *Taylor v. Townsend*, 8 Mass. 411; *Gray v. Oyler*, 2 Bush 256; *Smith v. Goodwin*, 2 Me. 173; *Fulmer v. Tabor*, 39 Me. 519; *Russell v. Brown*, 63 Me. 203; *Hamphries v. Newman*, 51 Me. 40; *Finch v. Alston*, 2 Stew. & P. 85; *Whitaker v. Cawthorne*, 3 Dec. 389; *Reese v. Jared*, 15 Ind. 142; *Cram v. Hill*, 40 Iowa 506; *Mills v. Redick*, 1 Neb. 437; *Emerson v. Western Union R. R. Co.*, 75 Ill. 175; *Carpentier v. Small*, 35 Cal. 346; *Ramsden v. Dyson*, 12 Jur. (N. S.) 506; *Jones v. Chappell*, L. R. (20 Eq.) 539; *Linaham v. Barr*, 41 Conn. 471; *Bennet v. Clemence*, 6 Allen 10; *Gibson v. Hutchins*, 12 La. An. 545; also, *Carson v. Clark* and other cases *infra*). The secretary of a corporation bought books with his own money, in which he entered subscriptions to the stock, &c.—*Held*, that the property of the books was in the corporation (*State, N. & N. Y. R. R. v. Goll*, 3 Vr. 285). Two broken chains belonging one to A. and one to B., were carried by B., without A.'s consent, to a blacksmith, who made them into two chains, thereby

Jewett v. Dringer and Bowman.

chaser or consignee, stating each car by its number, the weight of its contents in pounds, the several kinds of material, the price of each and the aggregate amount.

The defendant Bowman, during his agency, had no supervision of the weighing or loading, his duty being that of bargaining with the purchaser, and afterwards giving directions for delivery at the shops from which the goods were to be shipped.

From April, 1873, to April, 1876, Dringer, as appears from his books of account, purchased and received from the company material weighing in all 18,810,953 pounds, or about 8,400 gross tons of 2,240 pounds each. The complainant asserts that, besides this amount shown by the defendant's books of account, he received over four millions of pounds, or about two thousand tons, of which no account was rendered, and for which nothing was paid. Before the filing of the bill he had paid the company more than \$150,000. His answer admits an existing indebtedness of \$35,646.97. The complainant asserts the true balance to be three times the admitted one.

adding two or three of A.'s links to B.'s chain.—*Held*, that the title did not thereby vest in A. (*Pulcifer v. Page*, 32 Me. 404).

Furs left in a debtor's hands after an insolvent assignment, and made up by him into hats, were held to have lost their identity, so that the title was vested in the debtor (*Worth v. Northam*, 4 Ired. 102; see *Swift v. Barnum*, 23 Conn. 523; *Gregory v. Stryker*, 2 Denio 628; *Dresser Manf. Co. v. Waterston*, 3 Mete. (Mass.) 9); rails and posts put on lands, as a fence, by a trespasser, belong to the land-owner (*Ricketts v. Dorrel*, 55 Ind. 470; see *Hines v. Ament*, and other cases *infra*); and a railroad track (*Van Keuren v. Central R. R.*, 9 Vr. 165; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Shoemaker v. Simpson*, 16 Kan. 43, 3 Cent. L. J. 616, 693; see *Miss. & Tenn. R. R. v. Devaney*, 42 Miss. 555; *Ewell on Fixt.* 58, note).

As to vacant lands, the general rule is that the purchaser takes all improvements &c. previously put thereon by a trespasser; as trees felled and cut into cord wood (*Brock v. Smith*, 14 Ark. 431; *Turley v. Tucker*, 6 Mo. 583, overruling *James v. Snelson*, 3 Mo. 393. CONTRA, *Kee-ton v. Audsley*, 19 Mo. 362; *Carpenter v. Lewis*, 6 Ala. 682; *Pennybecker v. McDougall*, 48 Cal. 160; see, also, *Perkins v. Hackleman*, 26 Miss. 41; *Hungerford v. Redford*, 29 Wis. 345; *Dreyer v. Ming*, 23 Mo. 434; *Waterm. on Tresp.* § 819; *Winter v. Shrewsbury*, 2 Scam. 283; *Altamose v. Hufsmith*, 45 Pa. St. 121). So, where the injury was done between the time of purchase and the actual entering into possession (*Blevins v. Cole*, 1 Ala.

Jewett v. Dringer and Bowman.

The testimony and exhibits on both sides produced before the vice-chancellor are unusually voluminous, covering in all nearly two thousand two hundred printed pages. Ninety-eight witnesses were examined for the complainant and eighty-three witnesses for the defendants. The question of fact to be settled is the question of fraud. In disposing of it, it will not be necessary, if practicable, to do more than exhibit briefly the several classes of proofs relied upon to establish the fraud and their collective result.

Reference was made by counsel on both sides, in discussing Dringer's transactions and books of account, to his personal history and defective education. He was born in Austria, and is thirty-eight years of age. In 1868 he worked in a junk-shop in Newark for nine or ten dollars per week. Having earned about \$500, he started business in Paterson, in 1869, with a partner who put in \$250, and by whose death the business, from 1872, was carried on by himself alone. His books were kept, during this later period, by a book-keeper, who was examined as a witness in the cause.

210; *Gale v. Davis*, 7 Mo. 544). The rule extends to crops planted on vacant lands by a trespasser (*Boyer v. Williams*, 5 Mo. 335; *Floyd v. Ricks*, 14 Ark. 286; *Razor v. Quails*, 4 Blackf. 286; see *Stockwell v. Phelps*, 34 N. Y. 363; *Reilly v. Ringland*, 39 Iowa 106; *Nudd v. Hobbs*, 17 N. H. 524); or any improvements, such as fences, fruit trees, buildings &c., made by a squatter (*Carson v. Clark*, 1 Scam. 115; *Mitchell v. Billingsley*, 17 Ala. 391; *Hatfield v. Wallace*, 7 Mo. 112; *Campbell v. Com.*, 2 Rob. (Va.) 791; *Cook v. Foster*, 7 Ill. 652; *Collins v. Bartlett*, 44 Cal. 371); but shingles made thereon were held to belong to the maker (*Reader v. Moody*, 3 Jones (N. C.) 372); hay cut by one in adverse possession of public lands, cannot be replevied by a prior possessor (*Page v. Fowler*, 28 Cal. 605, 37 Cal. 100; see *Johnson v. Barber*, 5 Gilm. 425; *Stockwell v. Phelps*, 34 N. Y. 363); turpentine collected from trees by the lessee of a stranger in possession without title, was held not to belong to a subsequent purchaser from the state (*Branch v. Morrison*, 6 Jones (N. C.) 16; *Branch v. Campbell*, 7 Jones (N. C.) 378; see, also, *Duncan v. Potts*, 5 Stew. & Port. 82).

Stone tortiously taken from a quarry, dressed, and laid as a pavement, belongs to the owner of the lot (*Jackson v. Walton*, 28 Vt. 43; see *Woodman v. Pease*, 17 N. H. 282); materials removed from a house by a mortgagor, and sold and used by his purchaser in building a house on other lands, cannot be followed by the mortgagee (*Peirce v. Goddard*, 22 Pick. 559; *Madigan v. McCarthy*, 108 Mass. 376; also,

Jewett v. Dringer and Bowman.

Dringer testified to his own inability to read or write. His general native capacity is evinced by the extent of the business which he personally conducted. His acquaintance with writing was, to some extent, manifested on the witness stand, and argues, I think, less illiteracy than he attributes to himself; but, whether this be so or not, the competency of his book-keeper was not questioned, and the books themselves have been apparently kept with average carefulness and skill.

The first of the proofs, relied on to establish the fraud, is the result obtained from an examination of these books from May, 1872, to April 30th, 1876. The total amount of goods sold in this period, added to the amount of goods on hand in the inventory made by Mr. Miller, the receiver, is in excess of the total purchases, shown by the books, to the extent of 4,445,193 pounds, or about 2,000 tons.

Another kind of proofs is made up of the acts and declarations of Dringer, sworn to by witnesses, to the effect that he gave bribes to the company's employes, especially at Susquehanna; that he was habitually present at that shop when his

Beers v. St. John, 16 Conn. 322; *Salter v. Sample*, 71 Ill. 430; see, however, *Hamlin v. Parsons*, 12 Minn. 108; *Wilmarth v. Bancroft*, 10 Allen 348; *Dawson v. Powell*, 3 Bush 663; *Beard v. Duralde*, 23 La. An. 284; *Strickland v. Parker*, 54 Me. 263; *Buckout v. Swift*, 27 Cal. 433). A pole was taken by a trespasser, and used by him in erecting scaffolding; it was retaken by the owner, and in consequence of its removal, the scaffolding was weakened, fell and injured the trespasser when he went thereon.—*Held*, that the owner was not liable (*White v. Twitchell*, 25 Vt. 620). Pine trees cut by a mortgagor become personalty by the severance, and the mortgagee has no claim to them after foreclosure and sale (*Borthold v. Holman*, 12 Minn. 335; *King v. Bangs*, 120 Mass. 514; *Gooding v. Shea*, 103 Mass. 360; *Peterson v. Clark*, 15 Johns. 205; but see *Gore v. Jenness*, 19 Me. 53; *Whidden v. Seelye*, 40 Me. 247); see, also, *Kircher v. Schalk*, 10 Vr. 335; *Rich v. Baker*, 3 Denio 79; *Crouch v. Smith*, 1 Md. Ch. 401; *Hutchins v. King*, 1 Wall. 53; *Hewes v. Bickford*, 49 Me. 71; *Laflin v. Griffith*, 35 Barb. 58; *Bruce's Case*, 16 Nat. B'k Reg. 318; *Langdon v. Paul*, 22 Vt. 205; *Lackas v. Bahl*, 43 Wis. 53; *Curry v. Schmidt*, 54 Mo. 515; *O'Dougherty v. Felt*, 65 Barb. 220; *Moers v. Wait*, 3 Wend. 104; *Thomas v. Crofut*, 14 N. Y. 474; *Richardson v. York*, 14 Me. 216; *Waterman on Tresp.* §§ 772, 777, 840); the husband of a *cestui que trust* of lands, entering and cutting trees, with the trustee's consent, acquires no interest therein which can be subjected to his debts (*Baldwin v. Porter*, 17 Conn. 473; see *Porch v. Eries*, 3 C. E. Gr. 204; *Mitchell v. Stetson*, 2

Jewett v. Dringer and Bowman.

car-loads were put on and weighed; that he took part in the loading and weighing; that cars were sometimes loaded at night, or out of business hours; that he stopped there in the house of the employe who had charge of the weighing, and sometimes in company with a woman who was known to be his mistress; that he gave presents to one or more of the weigh-master's family, with whom he was on intimate terms; that, in talking of his trade with the company, he boasted of being in with the right parties, who were his friends and would stand by him.

Another kind of proofs is the testimony of witnesses as to the size of the loads and the quality of the material, as they saw them put in the cars for Dringer.

Another is derived from a comparison of the weights of the loads sent to Dringer, from Susquehanna, with the weights of the same material sent in cars of the same capacity, to other parties at Paterson or Jersey City; and, also, from a comparison of loads sent to Dringer from Susquehanna, with loads sent to him from Jersey City, where he was not present at the loading, and where his influence with

Cush. 435; *Glidden v. Taylor*, 16 *Ohio St.* 509; *Dickinson v. Codwise*, 1 *Sandf. Ch.* 214).

A recovery in ejectment does not entitle the party to reclaim several millions of bricks made by the former occupant from the clay of the lands, under a supposed title (*Lampton v. Preston*, 1 *J. J. Marsh.* 454; see *Harris v. Newman*, 5 *How. (Mass.)* 654; *Anderson v. Hapler*, 34 *Ill.* 436; *Moseley v. Miller*, 13 *Bush* 408; *O'Hagan v. Cline-smith*, 24 *Iowa* 249; *Key v. Woolfolk*, 6 *Rob. (La.)* 424; *Miller v. Phillips*, 31 *Pa. St.* 456); the same rule was applied to crops gathered before a *hab. fac. poss.* executed, or right of entry established (*Brothers v. Hurdle*, 10 *Ired.* 490; *Thomas v. Moody*, 11 *Mc.* 139; *Codrington v. Johnstone*, 1 *Beav.* 520; see *Hooser v. Hays*, 10 *B. Mon.* 72; *Pennybecker v. McDougall*, 46 *Cal.* 661; *Doe v. Witherick*, 3 *Bing.* 11; *Hodgson v. Gascoigne*, 5 *B. & A.* 88; *Simpkins v. Rogers*, 15 *Ill.* 397; *Altes v. Hinckler*, 36 *Ill.* 255; *Nichols v. Dewey*, 4 *Allen* 386); and to timber cut on lands of one not in possession (*McClain v. Todd*, 5 *J. J. Marsh.* 335; *Cochran v. Whitesides*, 34 *Mo.* 417; *King v. Baker*, 25 *Pa. St.* 186; see *Rogers v. Potter*, 3 *Vr.* 78; *Yahoola Co. v. Irby*, 40 *Ga.* 479; *Shields v. Henderson*, 1 *Litt.* 239; *Icay v. McQueen*, 17 *Ala.* 408). An innocent purchaser from trespassers who cut trees and made them into railroad ties, is liable for their value as trees only, and not for their value, increased three-fold by the trespassers, as ties (*Lake Shore R. R. v. Hutchins*, *Sup. Ct. Ohio*, Dec. 1877, 6 *Cent. L. J.* 436; but see *Nesbitt v. St. Paul Lumber Co.*, 21

Jewett v. Dringer and Bowman.

the employes was not similarly felt. The weights stated in the bills or vouchers from Susquehanna, to Dringer, are almost invariably less than the weights of loads sent to other parties, and less than those sent to himself from Jersey City.

Another and fifth class of proofs is made up of several specific instances wherein the weights of car-loads, as set down in the vouchers from Susquehanna, are shown to be less than the true weights, ascertained by Dringer by reweighing the loads for himself when received by him at Paterson. These instances are found in a small weight-book, kept by the defendant, which, after being offered and marked as an exhibit before the vice-chancellor, appears to have been mislaid, so that the instances themselves were not brought to his notice in the argument before him. They were insisted on in this court as plenary and demonstrative proofs. They were not denied or explained by any suggestions on behalf of the defendants, nor can I see how any explanation avoiding their effect can be given. This weight-book, marked exhibit 112 for complainant, is a small pass-

Minn. 491). An innocent purchaser of a steam-engine hired and wrongfully annexed to the freehold by the bailee, may hold it against the owner (*Fryatt v. Sullivan Co.*, 5 *Hill* 116, 7 *Hill* 529; *Goddard v. Bolster*, 6 *Me.* 427; *Frankland v. Moulton*, 5 *Wis.* 1; *Woodruff Iron Works v. Adams*, 37 *Conn.* 233; see *Cope v. Romeyne*, 4 *McLean* 384).

II. *An intentional, but not fraudulent, mixture, it seems, works no forfeiture.*

(*Pratt v. Bryant*, 20 *Vt.* 333; *Ryder v. Hathaway*, 21 *Pick.* 298; *Att'y-Gen. v. Fullerton*, 2 *Ves. & B.* 263; *Clark v. Griffith*, 24 *N. Y.* 595; see, however, *Brakeley v. Tuttle*, 3 *W. Va.* 86; *Redington v. Chase*, 44 *N. H.* 36; *Goddard v. Bolster*, 6 *Me.* 427; *Clark v. Miller*, 4 *Wend.* 628; *Colburn v. Simms*, 2 *Hare* 543, 554).

In *The Distilled Spirits*, 11 *Wall.* 356, the government, after forfeiture of certain spirits, ran them through leaches mingled with other spirits belonging to the same party.—*Held*, that the identity of the liquor was not destroyed by the rectifying process, nor thereby forfeited by the government, and that each was entitled to his portion.

In *Gordon v. Jenney*, 6 *Mass.* 465, after a deputy-sheriff levied on certain goods in a store, another deputy levied on other similar goods, standing in front of the store, and carried them into the building where they were intermixed with the rest.—*Held*, that the second deputy thereby lost his levy. Also, *Sawyer v. Merrill*, 6 *Pick.* 477; *James v. Burnet, Spen.* 635.

Jewett v. Dringer and Bowman.

book whose entries, with the few exceptions now referred to, are the weights of the loads as shown by the company's vouchers. The excepted instances or entries are those of the weights ascertained on their arrival in Paterson. For example: Three car-loads of scrap sent from Susquehanna, June 7th, 1873, were weighed at Paterson in the wagons; the weights of the wagons, loaded and empty, are set down in two columns, and the difference between the two, being the weights of the loads, in a third. An entry between the columns identifies these wagon-loads as taken from the three car-loads whose weights are put down in the voucher of the company. The difference between the wrong weight at Susquehanna and the right weight at Paterson, is 8,925 pounds, a difference in favor of Dringer, on each car-load, of 2,975 pounds, and a difference on the whole shipment, of a trifle less than four tons. In his journal, the company is credited with the smaller weight stated in the voucher.

Several other instances of similar conclusiveness are furnished by this exhibit. Entries of this kind were soon dis-

Bank-bills, securities &c. not capable of identification, are forfeited by confusion with similar chattels (*Pinton v. Pinton*, 15 Ves. 440; *Taylor v. Plumer*, 3 M. & S. 562; *Drake v. Taylor*, 6 Blatch. 14; *Ward v. Eyre*, 2 Bulst. 323; *Fellows v. Mitchell*, 1 P. Wms. 81, 83; *Levy v. Cavanagh*, 2 Bosw. 100. See *Tower v. Appleton Bank*, 3 Allen 387; *Skidmore v. Taylor*, 29 Cal. 619; *Coffin v. Anderson*, 4 Blackf. 395; *Moody v. Keener*, 7 Port. (Ala.) 218; *Pettit v. Boujon*, 1 Mo. 64; *Sager v. Blain*, 44 N. Y. 445).

Bricks laid in a wall, under a contract which was afterwards forfeited, the contract relet and the same bricks removed and piled up to be again used, became realty by their first use, and are not subject to levy, as personalty, by the creditors of the first contractor (*Moore v. Cunningham*, 23 Ill. 328; *Beard v. Duralde*, 23 La. An. 284; *Wadleigh v. Janvier*, 41 N. H. 505).

Where milk was contributed by several farmers and worked into cheese by a company which sold it, each farmer sharing the expense and profit proportionately, the cheese was held not to be subject to levy by the creditors of one of the farmers (*Butterfield v. Lathrop*, 71 Pa. St. 225).

In *Wetherbee v. Green*, 22 Mich. 311, G., a tenant in common, authorized his co-tenant S., by parol, to sell timber from the lands. S. being indebted to C. and B., conveyed to them by warranty-deed, the undivided half of the land, on a parol condition to reconvey on payment of their debts. S., after such conveyance, sold a quantity of the timber

Jewett v. Dringer and Bowman.

continued, and in a partial copy of the book, made in a larger form, the entries themselves are omitted.

It appears, from the evidence, that the loads from Jersey City were reweighed, at Dringer's request, by the company's agent, at Paterson. The loads from Susquehanna were never so weighed. Why not, sufficiently appears from the results of his own reweighing in the experimental instances mentioned.

In the presence of these facts, and of the oath of Dringer that he never received from the company any material, to his knowledge, beyond what was reported to the company, it is needless to inquire what reliance can be put upon his testimony, or of what avail is the testimony of witnesses to his good character and credit.

As to the other classes of proofs, a few observations will suffice. In their combination they establish, in my judgment, beyond a reasonable doubt, the fact of fraud, both in the weights and in the quality of the goods.

The testimony of the witnesses who have sworn to his declarations and acts, though the testimony of some of them

to the plaintiff, who cut the same into hoops. On replevin brought by G., C. and B. for the hoops,—*Held*, that the timber cut under a supposed proper authority being worth \$25 and the hoops made therefrom worth \$700, the title passed to the plaintiff. Also, *Baker v. Wheeler, Lock. Rev. Cas.* 470; *Alford v. Bradeen*, 1 *Nev.* 228; *Elwell v. Burnside*, 44 *Barb.* 447; *Brown v. Sax*, 7 *Cow.* 95; *Haskins v. Record*, 32 *Vt.* 575; *Harmon v. Gartman*, *Harp.* 430.

In *Gray v. Parker*, 38 *Mo.* 160, certain trunks belonging to the plaintiff disappeared and were found, as claimed, among other trunks, at defendant's trunk-store.—*Held*, that no tortious taking being proved, it was error to instruct the jury that if the defendant willfully took and carried away the trunks, and afterwards mixed them with his own so that it was impossible to identify them, then the plaintiff was entitled to recover any of defendant's goods to the amount taken, although such instruction would have been correct, if the defendant had been shown to be a willful trespasser.

In *Alley v. Adams*, 44 *Ala.* 609, after the execution of a chattel mortgage on a steam-engine &c., the mortgagor attached several other machines thereto.—*Held*, that since they were capable of identification and detachment, the mortgagee could not claim them; see *Randolph v. Gwynne*, 3 *Hal. Ch.* 88; *Perry v. Pettingill*, 33 *N. H.* 433; *Fowler v. Hoffman*, 31 *Mich.* 215; *Jewett v. Patridge*, 12 *Me.* 243; *Robinson v. Holt*, 39 *N. H.* 557; *Cochran v. Flint*, 57 *N. H.* 514; *Dunning v. Stearns*,

Jewett v. Dringer and Bowman.

was sought to be broken by impeaching their reputation for veracity, is corroborated by circumstances incapable of dispute, and must be accepted as substantially true.

The corroborative proof, from a comparison of the loads to Dringer from Susquehanna with the loads to other parties, of the same material, from the same shop, may be seen by an example, taken at random, from the account shown by the exhibits. Thus, in August, 1875, twenty car-loads were sent to him at Paterson, and three car-loads to a party at Jersey City. The average weight of Dringer's loads, as put down in the vouchers, is 19,210 pounds. The average weight of the others is 24,675 pounds—a difference, in his favor, on each load, of about two and a half tons. Taking, for another example, the longer period from March 5th, 1875, to February 24th, 1876, there were sent to him, from the same shop, one hundred and ninety-two loads, of which the average weight of each load, as set down in the vouchers, is 19,301 pounds. During the same period there were sent, from the same shop, to other parties in Jersey City and Paterson, thirty-nine loads, of an average weight

9 Barb. 630; *Adams v. Wildes*, 107 Mass. 123; *Hamilton v. Rogers*, 8 Md. 301.

In *Stuart v. Phelps*, 39 Iowa 14, the holder of a chattel-mortgage on a crop of growing corn, brought trover against the defendant for its conversion. The latter claimed by virtue of a judgment and execution against the mortgagor.—*Held*, that the plaintiff was entitled to recover the value of the corn in the crib in which it had been put by the defendant, after husking, and that if the defendant had confused it with his own corn in the crib, the duty of separating his own lay on him; also, that the cost of husking and gathering could not be deducted. See, also, *Benjamin v. Benjamin*, 15 Conn. 347; *Ellis v. Wire*, 33 Ind. 127; *Backenstoss v. Stahler*, 33 Pa. St. 251; *Johnson v. Tantlinger*, 31 Iowa 500; *Cook v. Steel*, 42 Tex. 57; *Lewis v. Whittemore*, 5 N. H. 364; *Herman on Chat. Mort.* § 45.

The rule is the same, if a purchaser from the mortgagor with notice confound his own goods with those covered by the mortgage (*Fuller v. Paige*, 26 Ill. 358; *Preston v. Leighton*, 6 Md. 88; *Willard v. Rice*, 11 Metc. (Mass.) 493; see *Southworth v. Isham*, 3 Sandf. 448).

If a mortgagee in possession mixes his own goods with those mortgaged, a failure to select his own, at the mortgagor's request, is evidence of a conversion (*Simpson v. Carleton*, 1 Allen 109; see *Armstrong v. McAlpin*, 18 Ohio St. 184).

Jewett v. Dringer and Bowman.

to each load of 24,916 pounds—a difference in Dringer's favor, on each of the one hundred and ninety-two loads, of 5,615 pounds, or something over two and a half tons per load.

These figures give the direct testimony respecting deception in weights a probability too strong to be resisted. Comparing the loads sent him from Jersey City with those sent him from Susquehanna, the same result appears, the same loss to the company.

Much of the argument was in regard to the tabulated statement, marked exhibit 118, made up from Dringer's books, showing his total purchases on one side and his total sales on the other, from May, 1872, to the beginning of this suit. By adding to his total sales the material in his yard in the possession of his receiver, and deducting from their amount the total purchase of material, a surplus is found of about 2,000 tons; that is to say, he appears to have on hand 2,000 tons never purchased. The inference of fraud from

In *Ryder v. Hathaway*, 21 *Pick.* 298, it was held, that if a plaintiff mingled wood cut from different lots, supposing it all to be his own, and afterwards the defendant, knowing that a part of it came from the plaintiff's land, took the whole, he would be held liable as a trespasser.

In *Panton v. Panton*, 15 *Ves.* 440, a clerk remitted his own money, together with that of his employer, to a broker, to be invested in securities which became so confused that the property could not be distinguished.—*Held*, that he must lose the whole. See *Wharton on Agency*, §§ 243, 279; *Hall v. Page*, 4 *Ga.* 428; *Wiley v. Riry*, 43 *Ga.* 438; *Beach v. Forsyth*, 14 *Barb.* 499; *Lord Chedworth v. Edwards*, 8 *Ves.* 46, 50; *Griffith v. Bogardus*, 14 *Cal.* 410; *Goddard v. Bolster*, 6 *Me.* 427. So, if, after such confusion, the money be stolen, the burden of proof is on the agent to prove that the part stolen was his principal's. *Bartlett v. Hamilton*, 46 *Me.* 435.

The rule is the same as to confusion by an administrator or trustee (*Perry on Trusts*, §§ 128, 447, 463, 837; *Lake v. Park*, 4 *Harr.* 108; *Frey v. Demarest*, 1 *C. E. Gr.* 236; *Elmer v. Loper*, 10 *C. E. Gr.* 475; *Brackenridge v. Holland*, 2 *Bluckf.* 377; *Ringgold v. Ringgold*, 1 *Har. & Gill* 11; *Crane v. DeCamp*, 7 *C. E. Gr.* 614); and as to creditors the *cestui que trust* thereafter stands the same as any other creditor. (*Nevins v. Disborough*, 1 *Gr.* 343; *Janeway's Case*, 4 *Nat. Bank. Reg.* 100; *Thompson's Appeal*, 22 *Pa. St.* 16.)

III. A confusion of goods by mistake creates no forfeiture.

In *Weymouth v. C. & N. R. R. Co.*, 17 *Wis.* 556, wood was cut by the plaintiff and piled near the track of the defendants, for sale. By

Jewett v. Dringer and Bowman.

this surplus was strenuously combated by denying, first, the correctness, or rather the completeness, of his books; secondly, the correctness of the receiver's inventory of goods on hand; and, thirdly, by asserting the existence of a large quantity of goods on hand at the opening of the books in May, 1872.

It cannot be doubted, I think, after carefully studying the evidence, that each of the three points thus taken for the defendant is, to some extent, good.

Sales and purchases were made by Dringer of which no entries were made in his books, but the difference between the two—and it is by this difference only that the effect of the tabulated statement relied on would be changed—is relatively small. The inventory, also, is open to question, having been made approximately, and not by full and exact measurements or weights.

But the most ample allowances under these two heads would not dispose of one-fifth of the surplus, and, assuming

mistake, they took the wood away, and piled it, indiscriminately, with other wood of their own.—*Held*, that the proper measure of damages was its value at the time of the conversion, with such increase as it may have received from any cause independent of the defendants' acts. Also, *Moody v. Whitney*, 38 Me. 174; *Forsyth v. Wells*, 41 Pa. St. 291; *Grant v. Smith*, 26 Mich. 201; *Farwell v. Price*, 30 Mo. 587; but see *Benzet v. Thompson*, 13 Ired. 146; *Smith v. Goulder*, 22 Ga. 353; *Benjamin v. Benjamin*, 15 Conn. 347; *Hill v. Canfield*, 56 Pa. St. 454; *Coze v. England*, 65 Pa. St. 212; *Bailey v. Shaw*, 24 N. H. 297; *Hungerford v. Redford*, 29 Wis. 345; *Pearson v. Inlow*, 20 Mo. 322.

In *Winchester v. Craig*, 33 Mich. 205, defendants, who by mistake trespassed and cut logs on lands of the plaintiff and transported them with their own to market, were allowed the expense incurred by them in getting the logs from the land to the market. Also, *Foote v. Merrill*, 54 N. H. 490; *Final v. Backus*, 18 Mich. 218; see *Chipman v. Hibbard*, 6 Cal. 162; *Whitbeck v. N. Y. Cent. R. R.*, 36 Barb. 644; *Kier v. Peterson*, 46 Pa. St. 357; *Young v. Lloyd*, 65 Pa. St. 197; *Webster v. Moz*, 35 Wis. 75; *Isle Royal Mining Co. v. Hertin*, Sup. Ct. Mich., Oct. 1877, 17 Alb. L. J. 114; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491.

In *Newson v. Anderson*, 2 Ired. 42, A. cut a tree on his own land, which accidentally fell on B.'s land.—*Held*, that A. was liable therefor in trespass. See, also, *Lambert v. Bessy*, Ray. T. 421; *Wilson v. Newbury*, L. R. (7 Q. B.) 31; *Scullin v. Dolan*, 4 Daly 163; *Wright v. Comp-ton*, 53 Ind. 337.

In *Leonard v. Belknap*, 47 Vt. 602, ten turkeys belonging to the plaintiff wandered on defendant's land, and there mingled with and

Jewett v. Dringer and Bowman.

that the amount of goods on hand, at the opening of the books, was as large even as that stated by Dringer himself, a surplus of eight or ten hundred tons would still be left, suggesting, if not attesting, the false under-weights by which it was produced.

The inexact and debatable factors involved in this statement or table marked exhibit 118, can be corrected in a future accounting, when the material on hand has been more carefully weighed or computed. The table, as it stands, evinces more certainly the *fact* than the *extent* of the fraud.

While thus differing with the vice-chancellor as to the fullness and cogency of the proofs against Dringer, I agree with him in thinking that, as against the defendant Bowman, the allegations of the complainant inculpating him with his co-defendant, have not been maintained, and that, as to him, the bill should be dismissed. A sale to Dringer of 1,700 tons, the transaction specially set out and charged

were shut up with his turkeys. In trover, after a demand,—*Held*, that since plaintiff, as shown by the evidence, was entitled to ten of them, although he could not identify all of his own, that defendant's offer to allow him to take all that he could identify and any others that he might select up to a certain number—which, however, was less than ten—constituted a conversion.

In *Smith v. Morrill*, 56 Me. 566, the plaintiff trespassed on defendants' lands, cut their logs, put his own mark on them, and rafted them all together. The defendants, thereupon, with an intention of only reclaiming their own, actually took more. In trover, for the value of the excess,—*Held*, that they were not liable, as wrong-doers, until the plaintiff had pointed out his property and demanded it. Also, *Bryant v. Ware*, 30 Me. 295; *Barron v. Cobleigh*, 11 N. H. 559; *May v. Bliss*, 22 Vt. 477; *Root v. Bonnema*, 22 Wis. 539.

In *Parker v. Walrod*, 13 Wend. 296, 16 Wend. 514, a plaintiff, while a wagon of the defendant was in his possession, attached his own whiffletrees &c. thereto, and they were retaken by the defendant, without knowledge of the change.—*Held*, that trespass would not lie to recover the appendages. *Query*, whether there was any remedy. See *Clark v. Wells*, 45 Vt. 4.

In *Hines v. Ament*, 43 Mo. 298, a fence placed on another's lands, by reason of mistake of boundaries, was held not to lose its character as personality. Also, *Matson v. Calhoun*, 44 Mo. 368; *Whitfield v. Bodenhamer*, *Phillips* (N. C.) 362; *Stuyvesant v. Tompkins*, 9 Johns. 61, 11 Johns. 569; *Wentz v. Fincher*, 12 Ired. 297; *Doherty v. Thayer*, 31 Cal. 140; *Waterm. on Tresp.* § 715; *Ogden v. Lucas*, 48 Ill. 492; *Robertson v. Phillips*,

Jewett v. Dringer and Bowman.

to be fraudulent in the original bill, is not proved to be so by the evidence, which, in its bearing upon him, does not call for review. Whatever criticisms it may suggest, it does not warrant the adjudication of intentional wrong.

As to Dringer, the case is one of fraudulent procuring and intermixture of the company's goods with his own. The goods thus procured and intermingled were of different kinds and values, and cannot be so distinguished as to enable those of one owner to be separated from those of the other. The rule applicable to the case is well settled by authority and in accordance with natural justice.

In *Lupton v. White*, 15 Ves. 432, Lord Eldon states the old law to be, that if one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and, through the fault of the person mixing them, the other party cannot tell what was the original value of his prop-

3 Iowa 220; compare *Burleson v. Teeple*, 2 Greene (Ia.) 542; *Pfeiffer v. Grossman*, 15 Ill. 53; *Howard v. Black*, 42 Vt. 258; *Brown v. Bridges*, 31 Iowa 138; *Gidden v. Bennett*, 43 N. H. 306; *State v. Graves*, 74 N. C. 396; *McLaughlin v. Johnson*, 46 Ill. 163; *Huntington v. Whaley*, 29 Conn. 391; *Millar v. Humphries*, 2 A. K. Marsh. 446.

In *Treat v. Barber*, 7 Conn. 274, the plaintiff had in her possession, in a trunk, certain articles of clothing &c. of her own, which trunk also contained other similar articles claimed by her and also claimed as her father's. On the service of an attachment by his creditors, she refused to select from the trunk her own property, or to point out which belonged to her father.—*Held*, that there was no confusion of goods, since no actual fraud was shown, that the placing of the goods in the same trunk might have been accidental, and that the defendants were liable in trespass.

IV. As to a fraudulent mixture, the intent is always a question for the jury.

Taylor v. Jones, 42 N. H. 25; *Wood v. Hewett*, 10 Jur. 390. See *Watkins v. Gale*, 13 Ill. 152.

In *Wingate v. Smith*, 20 Me. 287, mill logs were fraudulently taken by another, converted into boards and so intermixed with his own as not to be distinguished.—*Held*, that replevin would lie for the whole pile of boards.

In *Ames v. Mississippi Boom Co.*, 8 Minn. 467, it was held that a plaintiff in replevin must identify logs claimed by him, notwithstanding the

Jewett v. Dringer and Bowman.

erty, he must have the whole. The observations of Sir William Blackstone are cited in the note pointing out the distinction between the civil law and our own law upon this point; the civil law, though giving the aggregate to the party who did not interfere in the mixture, allowed the other a satisfaction for his loss. "But our law," says Blackstone, "to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his consent." In *Hart v. Ten Eyck*, 5 *Johns. Ch.* 108, it is ruled that, if a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produced it, and it is for him to distinguish his own property or lose it. If it be a case of damages, damages are given to the utmost value that the

fact that defendant may have driven them with his own, so as to render them indistinguishable. Also, *Wood v. Fules*, 24 *Pa. St.* 246.

In *Loomis v. Green*, 7 *Greenl.* 386, it was held that if one willfully turns his own logs adrift in a stream, and they, in floating down, become confounded with others, the burden of proof is on him to identify his own. See, also, *Hesseltine v. Stockwell*, 30 *Me.* 237.

In *Heard v. James*, 49 *Miss.* 236, the defendants willfully cut trees on the plaintiff's lands, and converted them into staves.—*Held*, in replevin, that they were not entitled to deduct the value of their labor from the value of the staves. See, also, *Smith v. Goulder*, 22 *Ga.* 353; *Buckmaster v. Mower*, 21 *Vt.* 204; *Single v. Schneider*, 30 *Wis.* 570; *Herdie v. Young*, 55 *Pa. St.* 176; *Firmin v. Firmin*, 9 *Hun* 571; *Nesbit v. St. Paul Lumber Co.*, 21 *Minn.* 491.

As to a fraudulent mixture of literary matter, see *Mawman v. Tegg*, 2 *Russ.* 385, 391; *Lewis v. Fullarton*, 2 *Beav.* 11; 2 *Morgan's Law of Lit.* 616.

In *McDowell v. Rissell*, 37 *Pa. St.* 164, a brother-in-law of a judgment debtor fraudulently mingled his own goods, old iron, scrap &c., with that upon which creditors of the other owner were entitled to levy, and manufactured the whole.—*Held*, that he must lose the whole. See *Redington v. Chase*, 44 *N. H.* 36.

In *Beach v. Schmultz*, 20 *Ill.* 185, a cargo of different kinds of lumber was shipped to M.; there, without the knowledge of the plaintiff, a quantity of the same kind of lumber was put on board by G., and the whole reshipped to C.—*Held*, that the creditors of G. could not attach his interest in the cargo, because it could not be identified, and that G. forfeited the quantity he had added. Also, *Jenkins v. Steanka*, 19 *Wis.* 139.

Jewett v. Dringer and Bowman.

article will bear. The same doctrine is expressed and applied in *Providence Rubber Co. v. Goodyear's Ex'r*, 9 Wall. 988; *The Idaho*, 3 Otto 586; *Wooley v. Campbell*, 8 Vr. 169. In the last-cited case, the language of Justice Depue is, that the doctrine that one mixing his goods with those of another, so that a separation is impossible, loses his property, is a doctrine that is adopted to prevent fraud. It is never resorted to except in favor of an innocent party as against a wrong-doer.

In the present case, it is claimed, and may prove to be true, that the whole indebtedness from Dringer to the company, including the \$35,646.97 admitted to exist, is greater than the value of the goods in the receiver's possession. Whether this be so or not, the complainant is entitled to have the whole indebtedness ascertained as nearly as practicable, and a decree taken for the amount. For this purpose there

In *Seavy v. Dearborn*, 19 N. H. 351, a plaintiff was held to have lost all right to reclaim goods which he had willfully intermixed with those of a third person in a store. Also, *Smith v. Welch*, 10 Wis. 91; *Willard v. Rice*, 11 Metc. 493.

V. In the following cases the rule has been adopted, that even where the confusion has been fraudulent, the goods, if still capable of identification or apportionment, may be reclaimed.

In *Hesseltine v. Stockwell*, 30 Me. 237, a trespasser cut the plaintiff's logs, marked them with his own mark, and drove them with his own logs.—Held, that even if such acts were fraudulent, there could be no forfeiture, because the logs being of equal value, each owner was entitled to his proportion of the whole. Also, *Stearns v. Raymond*, 26 Wis. 74.

In *Goodenow v. Snyder*, 3 Greene (Ia.) 599, the same rule was applied in case of a forcible taking of gold dust by the defendant, and mixing it with his own.

In *Schulenberg v. Harriman*, 2 Dill. 398, 21 Wall. 44, logs were cut without license from lands belonging to the state of Minnesota, and intermingled with logs cut from other lands, so as not to be distinguishable.—Held, under the Minnesota statute, that the state could replevy her proportion from the whole mass. In *Stephenson v. Little*, 10 Mich. 433, the court were divided as to this point. See, also, *Ballou v. O'Brien*, 20 Mich. 304.

In *Wood v. Fales*, 24 Pa. St. 246, after the plaintiffs sent a large number of cloths to be printed, the sheriff seized all of the goods in the factory, and the plaintiffs then claimed two hundred and fifty-two pieces, and, not being able to identify their own, they claimed that number of similar goods.—Held, that if the printers had actually confused them, the plaintiffs' claim must be allowed; *aliter*, if they had

Jewett v. Dringer and Bowman.

should be a reference to a master. The receiver should be empowered to make sale of the goods and apply the proceeds to the debt admitted to be due, and the balance, if any, to the additional indebtedness that may, upon the accounting, be found to exist. The difficulties in the way of arriving at satisfactorily definite, or at any other than proximate and probable, results, as to the extent of the fraudulent weights, and still more as to the values of the material fraudulently procured, are indeed great, and cannot, perhaps, be overcome; but they present no bar to the accounting and decree. "When," said Lord Brougham, in *Docker v. Somes*, 2 Myl. & K. 674, "did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrong-doer's argument, to stay the arm of justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather

sold the goods and had on hand similar goods which they intended to put in their place.

In *Wooley v. Campbell*, 8 Vr. 163, a trespasser planted oysters in plaintiff's bed.—*Held*, that he could not set up that the oysters taken by the plaintiffs were not natural ones or those planted by them.

In *Powers v. Kindt*, 13 Kan. 74, cattle belonging to two owners trespassed on lands, and it was impossible to determine the exact damage done by the cattle of each owner.—*Held*, that a verdict apportioning the damage according to the number of cattle belonging to each owner, was good. See *Durham v. Goodwin*, 54 Ill. 469.

An officer is not justified in levying on several articles where only some of them belong to the defendant, if those not belonging to him are capable of identification, as furniture in a house (*Bond v. Ward*, 7 Mass. 123; *Smith v. Sanborn*, 6 Gray 134; *Colwill v. Reeves*, 2 Camp. 575; but see *Taylor v. Jones*, 42 N. H. 25; *Armstrong v. McAlpine*, 18 Ohio St. 184); or, cattle (*Holbrook v. Hyde*, 1 Vt. 236); or, boots and shoes in boxes marked (*Tufts v. McClintock*, 28 Me. 424); or, crockery standing on a shelf (*Treat v. Barber*, 7 Conn. 274); or, horses in separate stalls (*Moore v. Bowman*, 47 N. H. 494).

In *Albee v. Webster*, 16 N. H. 362, a sheriff finding goods of A., the execution debtor, mingled with those of B., called upon B. to separate his therefrom, and, on refusal, levied on the whole.—*Held*, that he was not a trespasser. Also, *Sawyer v. Merrill*, 6 Pick. 477; *Shumway v. Rutter*, 8 Pick. 443; *Weil v. Silverstone*, 6 Bush 698; *Wellington v. Sedgwick*, 12 Cal. 469; *Smith v. Sanborn*, 6 Gray 134; *Robinson v. Holt*, 39 N. H. 557; *Roth v. Wells*, 41 Barb. 194, 29 N. Y. 471; but see *Kingsbury v. Pond*, 3 N. H. 511, where the confusion was without the fault of the plaintiff, and the sheriff was held liable as a trespasser; and also, *Wilson v. Lane*, 33 N. H. 466; *Treat v. Barber*, 7 Conn. 274.—REP.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

let me ask, When did any wrong-doer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, you had better not make the attempt, for you will find I have made the search very troublesome? The answer is, the court will try."

In the light of the facts in this case, and of the legal and equitable principles expressed by the authorities cited, the injunction and receivership, directed by the chancellor in the early stages of this suit, are seen to have been the appropriate and efficient methods of relief. The consequences to the defendant of the abrupt breaking up of his business and the taking possession of his goods by the court, destructive as they may have been of his seemingly great and rapid prosperity, are consequences of which he cannot be heard to complain. They were the legitimate end of his own dishonest practices, long-continued and systematic, by which the company and its receiver were defrauded of their property, their employes corrupted, involved in criminal guilt and made liable to criminal prosecution.

The decree below, dismissing the bill as to Dringer, should be reversed, with costs, and a decree made in accordance with the foregoing views.

Decree unanimously reversed.

THE BOARD OF CHOSEN FREEHOLDERS OF MIDDLESEX COUNTY
(George M. Wright, state treasurer, petitioner), appellants,

v.

THE STATE BANK AT NEW BRUNSWICK, respondent.

1. New Jersey does not possess the crown's common law prerogative to have its debts paid in preference to the debts of other creditors.

2. On the appointment of a receiver of an insolvent corporation, its title to its property is divested by force of law.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

On appeal from a decree of the vice-chancellor, reported in *Board of Chosen Freeholders of Middlesex Co. v. State Bank at New Brunswick*, 2 Stew. 268.

A statement of the facts in this case will be found on page 331.

Mr. Attorney-General Stockton, for the state.

I. *At common law, the king's debt is preferred.*

"The government was a privileged creditor, under the Roman law, and entitled to priority in the payment of debts. The *cessio bonorum* was made subject to this priority. This is generally the case in all modern bankrupt and insolvent laws. In England, the king's claim is preferred to that of a subject, provided the king's process was commenced before the subject had obtained judgment." 2 *Kent's Com.* 247.

The vice-chancellor, in his opinion, admits that the right of the crown in this particular is clear. He says that "the prerogative has at all times been most loyally upheld by the English courts. It stands on a common law maxim: '*Quando jus domini regis et subditi concurrunt, jus regis præferri debet.*' Debts due the crown by record, or upon

NOTE.—That the state is a preferred creditor, has been elsewhere decided upon two distinct grounds: (1) By virtue of her sovereignty, and (2) by virtue of the maxim that general words in a statute do not include the state unless expressly named, and hence debts due to the state are not affected by proceedings in bankruptcy, insolvency or assignments for the benefit of creditors.

The preference given to debts due the United States is solely statutory, and "does not stand upon any sovereign prerogative" (*United States v. State Bank*, 6 Pet. 29, 35, *Story J.*); while that of the several states is a branch of the common law of England, adopted as such, or by statutes declaratory thereof. *State of Maryland v. Bank of Maryland*, 6 Gill & J. 205; *Jones v. Jones*, 1 Bland (Md.) 444, 445; *Green's Case*, 4 Md. Ch. 349, 356; *Com. v. Lewis*, 6 Binn. (Pa.) 266, 271; *Robinson v. Bank of Darien*, 18 Ga. 65.

Statutes recognizing and asserting the priority of the state's claims, were passed among the earliest colonial laws. In Maryland in 1650, *Ibid.* 222; in Pennsylvania in 1705, *Brackenridge's Misc.* 117.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

specialty, are entitled to preference over debts of the same class due to subjects; but simple contract debts due to the crown are not entitled to preference over debts of record due to subjects. *Com. Dig., tit. Adm'r, ch. 2; Bac. Abr., tit. Ex'r, L 2; 2 Wms. on Ex'rs, 991.* But where both are simple contract debts, that due to the crown must be preferred. *Bac. Abr., tit. Ex'r, L 2; 2 Wms. on Ex'rs 993.* The king is supposed to be so constantly engrossed with public business as to be unable to give proper attention to matters relating to his revenue, and, therefore, no time occurs to him, and he is incapable of laches. *Gilbert's Hist. Exch. 90."*

That the right of the king to be first paid was a part of his royal prerogative, has not been disputed.

II. *By the common law, New Jersey became invested with this right, and holds it now.*

The vice-chancellor says: "If, by the adoption of the common law, New Jersey became invested with this right, it holds it now, in all its original force, and may wield it to-day in all its iron rigor. It has not been changed or mitigated by legislation—indeed, it is unknown in the legislation of the state—and if it exists at all, it is held as perfect and complete as it existed in the hands of George III. Statutes regulating private rights, or ameliorating private

The priority of the state, in addition to the cases cited in the opinion of the vice-chancellor, has been recognized by other cases in the following states: *Maryland, South Carolina, Georgia, Pennsylvania, Kentucky and North Carolina.*

MARYLAND.—In the distribution of an intestate's estate, between the claim of the state on a bond assigned by the intestate and a claim of a bond-debtor of the intestate, who had begun an action on his bond, which was then pending. *State v. Rogers, 2 Har. & McH. 198.* So, under nearly the same facts, in *Murray v. Ridley, 3 Har. & McH. 171.*

After the sale of an insolvent decedent's lands for the payment of his debts, deducting from the proceeds the claim of his widow for dower and the claims of his judgment creditors, the state was allowed a preference over other unsecured creditors on her claim against the decedent as a defaulting tax collector. *Smith v. State, 5 Gill 45.*

Upon two judgments rendered on the same day against a county clerk, one for the state, the other for a citizen, that of the state standing first on the docket, is entitled to priority. *Green's Case, 4 Md. Ch.*

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

remedies, do not extend to the king (1 *Bla. Com.* 261), nor to the state (*O'Hanlon v. Van Kleeck*, *Spn.* 31, 40; *S. C.*, 1 *Zab.* 582, 589). When a statute is general, and thereby any prerogative, right, title or interest is divested or taken from the king, in such case the king shall not be bound unless the statute is made to extend to him by express words. *Bac. Abr.*, *tit. Prerog.* E 5. If the right exists here, it is untouched by either constitutional or statutory regulation."

This prerogative, upon the revolution, vested in the people of New Jersey as the sovereign of the country, and is now in their hands.

The power of eminent domain—the foundation of our whole system of internal improvements—is but an incident of sovereignty, and derived from no other source than the clause of the constitution which adopted the common law of England. This right, like the right of dominion and property in the navigable waters, passed from King Charles, as a prerogative right and an incident to regal authority, to the Duke of York, and was embraced in the surrender to Queen Anne. Its possession by us at this day can be traced to no other authority than that prerogative which also embraced the priority of the king's debt.

In *Arnold v. Mundy*, 1 *Hal.* 1, Chief Justice Kirkpatrick says, on page 94: "I am of the opinion that, upon the

349; see *Hodges v. Mullikin*, 1 *Bland (Md.)* 503; *Davidson v. Clayland*, 1 *Har. & Johns.* 546.

A county clerk made an assignment to secure the sureties on his bond. Both the state and the city of Baltimore presented claims under the assignment for sums due them, respectively, for defaults of the clerk.—*Held*, that those of the state must be first paid. *State v. Baltimore*, 10 *Md.* 504.

SOUTH CAROLINA.—In an action against the sureties on an administration bond, they may show that the intestate owed a debt to the state for which the latter held his mortgage, and that the administrator, notwithstanding the mortgage, is entitled to retain the amount of the debt due to the state to the exclusion of other creditors. *Lenoir v. Winn*, 4 *Desauss.* 65.

GEORGIA.—Here the preference of the state is placed upon her sovereign right at common law, which was included in a general act of

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

revolution, all these royal rights became vested in the *people* of New Jersey, as the sovereign of the country, and are now in their hands."

"The right to navigable rivers and arms of the sea was included in the surrender of the proprietors to Queen Anne as a part of the sovereignty, and at the revolution vested in the state." *Gough v. Bell*, 1 Zab. 156, 2 Zab. 441, 3 Zab. 624. "When the people of New Jersey took the government into their own hands, the powers of sovereignty, the *prerogatives* and *jura regalia*, which before belonged either to the crown or to parliament, became immediately and rightfully vested in the state." *Bennett v. Boggs*, Bald. C. C. 60. Judge Baldwin says "the decision in *Arnold v. Mundy* ought to be conclusive."

The opinion of Chief Justice Taney, in *Martin v. Waddell*, delivered in 1842, has established indisputably that the *prerogative* and *jura regalia* of the crown are vested in the state of New Jersey, no matter where it may repose in other states. And this arises from the grant of Charles II to the Duke of York, by various deeds and conveyances to the proprietors of East New Jersey, and the surrender to Queen Anne in 1702. The case is reported in 3 Harr. 495.

The Chief Justice of the United States says: "The land or soil, under the navigable waters of East New Jersey,

the legislature adopting the common law. *Robinson v. Bank of Darien*, 18 Ga. 65.

PENNSYLVANIA.—It was held that the state "always took preference to individuals until the act of April, 1794, which directs that debts due to the state from deceased persons shall be last paid." *Com. v. Lewis*, 6 Binn. 266, 271, *Tilghman*, C. J. See *Mitchell's Estate*, 2 Watts 87; *Brackenridge's Misc.* 117. "Even yet she takes a preference with regard to the estates of living debtors, for an account settled by the accounting officers of the commonwealth becomes a lien on all the real estate of the debtor." *Ibid.*; *Forney v. Com.*, 10 Pa. St. 405; see *Com. Appeal*, 4 Pa. St. 164; *Arnold's Estate*, 46 Pa. St. 277.

MASSACHUSETTS.—Under a statute providing that the warden of the state prison was not, in effect, an agent of the state, and that consequently moneys received and deposited by him in a bank were not state funds, nor held in trust for the state,—*Held*, therefore, that such money could not be set off against a demand of the bank upon the

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

passed to the Duke of York, by the charters granted to him by his brother, Charles II of England, in 1664 and 1674, as one of the royalties incident to the powers of government, and were held by him in the same manner, and for the same purposes, that the navigable waters of England, and the soils under them, are held by the crown. All the interests of the Duke of York in East New Jersey, including the royalties and powers of government, were conveyed to the proprietors of East New Jersey, as fully and amply, and in the same condition as they were granted to him, and they had the same dominion and property in the navigable waters and soil under them, and in the rights of *fishery*, that had belonged to him under the original charter, and were held by them as a *prerogative* right, and incident to the *regal* authority; and were, by the said proprietors, in 1702, surrendered to Anne, queen of England, and her heirs and successors. The surrender, according to its evident object and meaning, restored to the crown, in the same plight and condition, whatever the Duke of York held as a royal prerogative right, with the political power to which it was incident. When the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the *prerogatives* and *jura regalia* which before belonged to either the crown or the par-

state. *Com. v. Phoenix Bank*, 11 Metc. 129. See, also, *Swartwout v. Mechanics Bank*, 5 Denio (N. Y.) 555; *Miller v. Receiver*, 1 Paige (N. Y.) 444. Following the Massachusetts case, the United States circuit court for Wisconsin (E. D.), decided, under a similar statute, that such warden was not to be considered a representative of the state of Wisconsin so far as to entitle him to claim, in distributing assets, a preference for the sum deposited by him in a bank which afterwards became insolvent. *Corn Exchange Bank Case*, 15 Nat. Bank. Reg. 431, *Drummond J.* [N. B. Under the Bankrupt Act the state is preferred.] See, also, *Brand's Case*, 3 Nat. Bank. Reg. 324.

NORTH CAROLINA.—After a fraudulent conveyance of lands and a sale under execution against the vendor, the fraudulent vendee, before the delivery of the sheriff's deed, entered into recognizance to the state.—*Held*, that as the fraudulent vendee had no valid title to the lands at the time of giving the recognizance, the state could thereby derive no preference over the execution purchaser, the sheriff's deed relating back to the time of his sale. *Hoke v. Henderson*, 3 Dev. 12.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

liament, became immediately and rightfully vested in the state."

The early history of New Jersey and Maryland are almost identical in respect to these questions. The grant to Lord Baltimore and the Duke of York were great state papers, framed with great deliberation; were submitted to the law officers of the crown, and every word well weighed and understood. The cotemporaneous history of England abundantly manifests this.

"The preference in payment of debts was a branch of government prerogative at common law, and it was introduced as such in Maryland. It is still the law where the property of the debtor remains in hand, and there is no lien standing in the way." 1 *Kent Com.* (12th ed.) 248, note (b).

The third article of the declaration of rights made on the 3d of November, 1776, declares that the inhabitants of Maryland are entitled to the common law of England and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration, &c.

The constitution of New Jersey, approved in provincial congress, at Burlington, July 2d, 1776, declares "That the common law of England as well as so much of the statute law as has been heretofore practiced in this colony, shall

The preference of the state is confined to its own claims, and does not embrace those of corporations of which the state is owner in whole or in part (*Bank of South Carolina v. Gibbs*, 3 *McCord* (S. C.) 377; *Fields v. Wheatley*, 1 *Sneed* (Tenn.) 351. See *Bank of Alabama v. Gibson*, 6 *Ala.* 814; *Turnpike Co. v. Wallace*, 8 *Watts* 316; *Moore v. Wabash Canal Co.*, 7 *Ind.* 462; *Seymour v. Milford Turnpike Co.*, 10 *Ohio* 476; *State Bank v. Brown*, 1 *Scam.* (Ill.) 106; *Governor v. Woodworth*, 63 *Ill.* 254); unless expressly included by statute. *Central Bank v. Little*, 11 *Ga.* 346; *Robinson v. Bank of Darien*, 18 *Ga.* 65; *Stone v. Dickson*, 38 *Ga.* 171; *Mahone v. Central Bank*, 17 *Ga.* 111; *Tilford v. Bank of Ky.*, 2 *Dona* 115, 121.

KENTUCKY.—It is only over debtors of the same degree; hence, an individual debtor by specialty is preferred to the state by simple contract. *Com. v. Logan*, 1 *Bibb* (Ky.) 529; *Smith v. State*, 5 *Gill* 45.

So an individual judgment debt is preferred to an unsecured claim of the state. *Hollingsworth v. Patten*, 3 *Har. & McH.* (Md.) 125; *State v. Cleary*, 2 *Hill* (S. C.) 600; *Brackenridge's Misc.* 142.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

still remain in force until they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever." *P. L.* 1821, p. 7, § 22.

In the case of *State of Maryland v. Bank of Maryland*, it was held: "The royal prerogative right of preference in payment of debts is a branch of the common law of *England*, and that common law has been adopted in this state by the general terms of the declaration of rights and the third article thereof. And this secures to the state the right at common law to have its debts first paid out of the property of the debtor remaining in his hands, and no lien standing in the way. The right of priority of the state is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid, where the individual creditor has no antecedent lien overreaching it. The state of Maryland's funds were deposited in a bank under resolutions of the general assembly, and the bank being in failing circumstances, the president and directors thereof transferred all its property to trustees for the equal benefit of all its creditors. Held, that the assignment was valid, and that the preference which the state had in the

MARYLAND.—It has been held that the lien of the state begins when suit is instituted. *Hodges v. Mullikin*, 1 *Bland* 503; *Jones v. Jones*, 1 *Bland* 443; *Davidson v. Clayland*, 1 *Har. & Johns*. 546.

GEORGIA.—That the state is not entitled to the writ of protection nor the extent in chief or in aid. *Robinson v. Bank of Darien*, 18 *Ga.* 65; but see *Jones v. Jones*, 1 *Bland* (*Md.*) 443; *Birchfield v. Brown*, *Id.* 446, *notes*.

The following cases are examples of the rule that proceedings in bankruptcy do not apply to or affect a state:

In *People v. Duncan*, 41 *Cal.* 509, a franchise to construct a turnpike was held to be not assignable to a bankrupt assignee, without the consent of the granting power. See *Stewart v. Hargrove*, 23 *Ala.* 429.

In *Stokes v. Georgia*, 46 *Ga.* 412, a sale of a bankrupt's land by his assignee was held not to divest the lien of the state thereon for taxes, although it was sold by the assignee free from encumbrance. See, also, *Doane v. Chittenden*, 25 *Ga.* 103; *Missouri v. Rowse*, 49 *Mo.* 586; *Brand's Case*, 3 *Nat. Bk. Reg.* 324; *Dunlap v. Gallatin Co.* 15 *Ill.* 7.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

payment of her claim so long as the title to the property remained in the bank was defeated by the deed of trust."

The vice-chancellor says, "An author quite as eminent as a jurist as any name that ever adorned the American bench, has stated that the right of preference of a state, in this country, does not rest upon the common law, but exists only where given by statute," citing 1 *Kent Com.* 248, note (c).

By reference to the note on page 248 (12th ed.) (the note being there marked note (b)), it appears that it was the remark of a judge in South Carolina in the case of *State v. Harris*, 2 *Bailey* 598, and not the opinion of the eminent jurist alluded to; but, on the contrary, the case shows that it was the opinion of Judge O'Neill: That as the statutes of South Carolina had specified when priorities should exist they had excluded the common law rule; and the early history of South Carolina shows that, unlike Maryland and New Jersey, the common law was never adopted in that state. The authority, therefore, cited by the vice-chancellor, amounts to nothing, except to the point that South Carolina did not adopt the common law including the *lex prerogativa*.

The note in *Kent*, after citing the law in Maryland as laid down in the case of *State v. Bank of Maryland*, alludes to the rule in South Carolina and then concludes: "The common

In *Com. v. Hutchinson*, 10 *Pa. St.* 466, to an action brought by the state for taxes on fees received by the defendant, from his successor, after the defendant's removal from the office of prothonotary, the defendant pleaded his discharge in bankruptcy.—*Held*, that such discharge did not bind the state.

In *Saunders v. Com.* 10 *Gratt.* 494, a similar plea to an information by the attorney-general against an inspector of a public warehouse and his sureties, for the amount of dues owing to the state by the inspector, was overruled on the same ground.

In *People v. Spalding*, 10 *Paige* 284, a defendant in chancery had been committed for contempt for not paying a fine.—*Held*, that his discharge in bankruptcy would not release him from its payment or from the confinement. [This case was afterwards affirmed in the New York court for the correction of errors, 7 *Hill* 301, and, again, in the United States supreme court. 4 *How.* 21.]

In *Jones v. State*, 28 *Ark.* 119, it was held that a discharge in bankruptcy was a good plea by a surety on a recognizance on an indictment.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

law prerogative of the king to be paid in preference to all other creditors, is therefore not *universally* adopted in this country," &c., &c. See 1 *Kent Com.* 248, note (b).

In the year 1848, in the case of *Green's Estate*, 4 *Md. Ch.* 349, it was held: "Whenever the state and a citizen have claims in equal degree, and a conflict arises by death or the act of the party not having enough to pay his debts, the claim of the citizen must yield to the right of the state."

And in the year 1856 the court of appeals in the state of Maryland, in the case of *State v. Baltimore*, reported in 10 *Md.* 504, held: "Where the *state* and other *parties* are creditors under the *same bond* of the *same party* who has conveyed his property by a deed of trust to indemnify his sureties on the bond, the state, by virtue of its prerogative, is entitled to priority of payment out of the proceeds of the property sold by the trustee in the deed, under the direction of a court of equity."

Georgia was one of the states that introduced the common law by enactment. The act can be found in *Marb. & Crawford Dig. of Ga.* 404. "And also the common law of England and such of the statute laws as were usually in force in the said province." The words are almost identical with the words in the constitution of New Jersey and in the declaration of rights in Maryland.

Bankrupt acts do not include the king (*Anonymous*, 1 *Atk.* 262; *Rex v. Parley*, *Bunb.* 202; *Russel's Case*, 19 *Ves.* 164, 165; *Temple's Case*, 2 *Ves. & Beam.* 391; *Cranford v. Att'y-Gen.* 7 *Price* 1); nor, the United States (*United States v. Rob Roy*, 1 *Woods* 42; *United States v. Herron*, 20 *Wall.* 251; *Lewis v. United States*, 2 *Otto* 618, 622).

The same rule applies to proceedings in insolvency.

In *People v. Rossiter*, 4 *Cow.* 143, a judgment was obtained by the state against an attorney for fees due the state, and under a *ca. sa.* issued thereon he was imprisoned,—*Held*, that a subsequent insolvent discharge would not release him.

In *People v. Herkimer*, 4 *Cow.* 345, to an action of *assumpsit* for fees due the state, the defendant pleaded that after the promises etc., he had obtained his discharge as an insolvent, and such plea, on general demurrer, was overruled. See, also, *State v. Baltimore*, 10 *Md.* 504, *ubi supra*; *Smith v. Randall*, 1 *Allen* 456, 460; *Att'y-Gen. v. Baker*, 9 *Rich. (S. C.) Eq.* 520.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

The adjudication on the subject in Georgia is that the sovereign right of priority *existed at common law*, and became a part of the law of Georgia. That it was a wholesome right and its exercise was necessary to protect the public revenue. The claim was not made in that state until 1855, so that the case is a direct authority against the vice-chancellor's doctrine that the right could be lost by non-user.

Judge Lumpkin says: "The sovereign right of the state to priority of payment out of the effects of an insolvent, is based upon the common law, and was adopted by the act of 1784, which introduces into the jurisprudence of Georgia the whole body of the common law. * * * * It is a wholesome right, and as such should receive the sanction and approbation of the courts. This right of priority is not inconsistent with the principle or spirit of our institutions, but is necessary for the protection of the public revenue, so as to enable the government to accomplish the end of its institution." *Robinson v. Bank of Darien*, 18 Ga. 66.

St. George Tucker, in his *Commentaries on Blackstone*, says: "As it respects the commonwealth of Virginia, considered as an independent state, unconnected with any other," the tracing of the progress of the common law of England to our own shores, "might have been regarded as an unneces-

In *Columbian Ins. Co. Case*, 3 Keyes 123, after an assessment for taxes on the *personality* of the company and a demand for payment, a receiver was, at the instance of a stockholder, appointed and qualified on the same day on which the marshal issued a warrant to collect the taxes.—*Held*, that the claim of the state took precedence over that of any creditor of the corporation.

In *State v. Walsh*, 2 Gill & J. (Md.) 406, the defendant obtained his insolvent discharge after the state had recovered judgment against him as surety on a delinquent tax-collector's bond. Subsequently he was arrested on a *ca. sa.* thereon.—*Held*, that he could plead his discharge in bar.

In *State v. Harris*, 2 Bailey 598, the state was held to be entitled to no preference over any other creditor, in the distribution of an insolvent's assets.

In *Scott's Case*, 19 Ohio St. 581, it was held that a statute authorizing parties imprisoned for the non-payment of fines to be discharged upon taking the benefit of the insolvent laws, was constitutional.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

sary trouble at this day; the convention by which the constitution of the commonwealth was established having expressly declared 'that the common law of England and all statutes or acts of parliament made in aid of the common law prior to the fourth year of James the First, which are of a general nature, not local to that kingdom, together with the several acts of the colony then in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be considered as in full force until the same shall be altered by the legislative powers of the commonwealth.' (*Ord. of Com., May, 1776*, c. 5, *Chancellors* 37.) From all these considerations it will appear that in our inquiries how far the common law and statutes of England were adopted in the British colonies; or, in other words, what parts of those laws might be deemed applicable to their respective situations and circumstances, we must again abandon all hopes of satisfaction from any *general theory*, and resort to their *several charters, provincial establishments, legislative codes and civil histories* for information. For, although the colonial legislatures are understood to have been inhibited from passing any law derogatory from the sovereignty of the crown or repugnant to the laws and statutes of England, which seems to have been the only common rule imposed upon them, yet the

An insolvent discharge does not bar the United States (*United States v. Wilson*, 8 Wheat. 253; *Glenn v. Humphreys*, 4 Wash. C. C. 424; *United States v. Hewes, Crabbe* 307).

In *Sessions v. Stevenson*, 11 Rich. (S. C.) Eq. 282, it was held that if the United States came in under a bill to marshal assets, it stood on the same footing as other creditors. See *Mitchell's Estate*, 2 Watts 87.

Assignments for the benefit of creditors do not affect a state.

In *Missouri v. Rowse*, 49 Mo. 586, a corporation, after neglecting for several years to pay their taxes, finally made an assignment. Afterwards the tax-collector seized their personal property, on which it was admitted he had no lien before (at common law, there is no lien on personalty for taxes, *Bailey v. Fuqua*, 24 Miss. 497), and it was bid in, at the sale, by the assignees, who then sued the collector on his official bond.—*Held*, that the claim of the state was not affected by the assignment. Compare *State v. Grover*, 8 Fr. 174; *Cones v. Wilson*, 14 Ind. 465; *Frierson v. Branch*, 30 Ark. 453. See *Anderson v. Mississippi*, 23 Miss. 459; *Murray v. Rottenham*, 6 Johns. Ch. 52.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

application of this rule in the several colonies will be found to have been as various as their respective soils, climates and productions."

The constitution of Massachusetts declares "that all the laws which had been theretofore adopted, used and approved in the province, colony or state of Massachusetts-Bay, and usually practiced on, in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature."

The constitution of South Carolina, established March 19th, 1778, declares "that the resolutions of the late congresses of that state, and all laws then in force there and not thereby repealed shall so continue until altered or repealed by the legislature of the state, unless where they are temporary."

In commenting upon these clauses, neither of which adopt the common law of England, and contrasting the result with the effect of such clauses introduced by New Jersey and Maryland, Mr. Tucker says: "The adoption of the laws of England, we see, was confined to such as had been theretofore adopted, used and approved, *within* the colony, and usually practiced on in the courts of law, with an exception as to such parts as were repugnant to the rights and liberties contained in the constitution. It was therefore essential to the force and obligations of any rule of the common law that it had been before that time actually adopted, used or

In *State of Maryland v. Bank of Maryland*, 6 Gill & Johns. 205, funds of the state were deposited in a bank which afterwards made an assignment.—*Held*, that the priority of the state was thereby destroyed.

The following opinions, possessing some historical as well as legal interest in connection with this subject, are here inserted: The prerogative right to royal mines was formerly asserted in New Jersey, as appears by the opinions of Sir Robert Raymond, attorney-general, and Sir Philip Yorke, solicitor-general, upon the application of Gov. Burnet, December 12th, 1722 (*Forsyth's Opinions* 158).

"The right to fines, forfeitures and escheats in New Jersey, belongs to the king, and not to the proprietors of the soil, by virtue of the grant to the Duke of York."—Sir Edward Northey, attorney-general, A.D. 1705 (*Forsyth's Opinions* 157).—REP.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

approved *in* the colony; and further, that it should not be repugnant to the rights and liberties contained in the constitution. Although it might be found in every law treatise, from Bracton and Glanville to Coke, Hale, Hawkins and Blackstone, or in every reporter from the year-books to the days of Lord Mansfield, it would have no more force in Massachusetts than an edict of the emperor of China."

The vice-chancellor further says that Mr. Griffith declared it to be his opinion "that our laws give no preference to debts of any kind due to the state; they stand only on the same footing as other debts, according to their degree." 4 *Grif. Law Reg.* 1281, note (2).

By reference to the citation it appears that Mr. Griffith does not sustain the position which he is cited to support. Under the title, "*Payment of debts by executors and administrators*," he asks the question, "Is the law of England in regard to the order of paying debts by executors and administrators, in force?" and answers it, viz.: "Where executors and administrators do not proceed as upon an *insolvent* estate, we have no law, so far as respects the *order and priority of payment of debts* and administration of the personal assets, other than the *common law*; except that an *executor*, being a debtor, is not released from his debt by such appointment, unless so expressed in the will; but it is to be assets, and so accounted for." (*R. L.* p. 573.) By a note he says: "Our laws give no preference to debts of any kind due to the state; they stand only on the footing of other debts, according to their degree." It appears, therefore, that in the text he says that we have "no law but the *common law*;" in the note he informs us of the fact that the statute referring to the payment of debts by executors and administrators contains no reference to the priority of the state. *The statutes referred to, and of which he is speaking, refer only to the estate of decedents.*

Yet, by reference to a portion of the vice-chancellor's opinion, already quoted, it will be seen that the king cannot

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

be divested by a general law of his rights, unless the statute is *made to extend to him by express words*.

The authority of Mr. Ewing is simply to the same effect. The deduction made from the passage by the vice-chancellor is *non sequitur*; he assumes that because a statute directory to executors and administrators, directing the order in which the debts of intestates shall be paid, does not include the priority of the sovereign, therefore the common law prerogative in cases of insolvent debtors is thereby abolished. See 2 *Kent Com.* *416; *Mitchell's Estate*, 2 *Watts* 87.

The vice-chancellor further says: "The federal government *unquestionably possessed* as high a prerogative right as a creditor as any sovereignty could under a government republican in form, yet it never attempted to exercise the crown's common law prerogative in this respect, but as early as 1797 established a right of preference by statute."

Now the simple truth is, that the federal government never possessed any common law power whatever, it being a fact, that has never been disputed, that it is a government of limited power, possessing no other rights than those conceded by the states. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Mr. Tucker says: "It is distressing to reflect that it ever should have been made a question whether the constitution of the United States, on the whole face of which is seen so much labor to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law; a law filling so many ample volumes; a law overspreading the entire field of legislation; a law that would sap the foundation of the constitution, as a system of limited and specified powers."

It was necessary for the sovereign to have the right, and therefore, under the exercise of its duty to pay the public

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

debts, it was held, in *Fisher v. Blight*, that congress possessed the power to pass such a statute. See 2 *Kent* 244. The fact that the federal government did not possess the power, so far from being an argument in favor of the states not inheriting it, is, on the contrary, additional evidence that the common law prerogative of the sovereign remained unimpaired in the states.

III. *If the prerogative existed, it could not be lost by non-user.*

The vice-chancellor says: "So far as my knowledge extends, no law officer of the state has ever attempted to enforce it. For over one hundred years, as an actual practical prerogative of government, it has neither been exerted nor recognized, and this * * would seem to negative the existence of the right with great emphasis." No argument can be deduced from non-user or the failure to assert it on the part of the law officers of the state—(1) Because, having been adopted by the constitution of the state, and declared to be a part of the law of this state by the supreme courts of this state and of the United States, its existence does not depend upon its exercise. (2) *Nullum tempus occurrit regi* has been the standing maxim upon all occasions.

In *Sanderson v. Baker & Vorste*, 4 *Mass.* 422, Chief Justice Parsons says: "No laches can be imputed against the government, and *against it no time runs so as to bar rights.*"

The right of proclaiming war or peace, making treaties and sending ambassadors, the *jus regium* in the shore, can not be lost by non-user. This latter was never asserted in New Jersey until 1821, and Judge Baldwin, in 1830, expresses an opinion that this right ought to be considered as established by the decision of *Arnold v. Mundy*. It is well known that the decision of the courts of this state since that time have advanced in the claim of the extent of this prerogative, until now, in derogation of common right, the riparian proprietor can be cut off from access to the water adjacent to his upland. As late as 1842 the question was again before Chief Justice Taney.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

The whole of the riparian laws, and the decisions of our courts thereupon, are gross assumptions of power if the suggestion of the vice-chancellor is tenable, for the right exercised by New Jersey to-day over the shore is at least as great as ever was claimed by the British crown.

Where can we turn to any claim made by any law officer to immunity on the part of the state from being sued, or protection for the property of the people from the process of the courts? It exists only by virtue of the sovereign prerogative, and because the state can do no wrong. The occasions for its assertion never occur.

In Maryland the sovereign claim of priority for its debts was not asserted until 1834, nearly sixty years after the declaration of independence; and yet the suggestion that this common law prerogative of the sovereign adopted by their bill of rights had been lost by non-user, was not even suggested in the Maryland case.

IV. *The title to the property of an insolvent corporation is not divested by force of law upon the appointment of a receiver.*

The vice-chancellor says, title to this property is divested by force of law, and such divestiture is perfect and absolute, and that no claim was made by the state until after a receiver had been appointed.

It appears in the case that, without making the state a party, or without any notice to the state treasurer or law officers of the state, the bank in New Brunswick which had on deposit \$34,000 of the taxes of the people of Middlesex county, deposited there by the collector of the county to the credit of the treasurer of the state, was declared insolvent and a receiver appointed. Immediately thereupon, by the direction of the then attorney-general, Hon. Jacob Vanatta, the state treasurer demanded the amount in full as a preferred claim, to which demand the reply was "that they were not in a condition to pay at that time." On July 7th, 1877, the state treasurer filed a petition on behalf of the state, asking an injunction to prevent any payment being made until the right of the state could be determined, which

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

order was granted, and now the vice-chancellor holds that although the right of the state might have been perfect on the day the receiver was appointed, that that appointment divested the title to the property by force of law.

The vice-chancellor has here fallen into an error in reference to a fundamental principle, and as it is made a part of the syllabus of the case as reported, it is of paramount importance that it should be corrected by this court.

In *Kline v. Jewett*, 11 C. E. Gr. 474, the vice-chancellor himself held that the receiver of the Erie Railroad Company stood in respect to duty and liability just where the corporation would were it operating the road. "That whether the receiver is regarded as the officer of the law or the representative of the proprietors of the corporation or its creditors, or as combining all their characters, he is trusted with the powers of the corporation and must, therefore, necessarily be burdened with its duties and subject to its liabilities."

The decree in the case is manifestly founded upon the undisputed doctrine that the receiver is an officer of the courts holding possession for those who may be decreed to have the right. *His possession was their possession.*

Mr. Kerr, in his book on Receivers, says: "The effect of the appointment of a receiver is to remove the possession of the property from the parties to the suit. If, at the time a receiver is appointed, a party claiming a right in the same subject-matter under a title paramount to that under which the receiver is appointed, is in possession of the right which he claims, the appointment of a receiver leaves him in possession, but parties to the suit, who are not in possession under a paramount title, are removed from possession by the appointment of a receiver. If a party to the suit be appointed receiver, the same rule obtains.

"The appointment of a receiver, however, does not in any way affect the right to the property. The court of chancery, in a suit for a receiver, deals with the possession only, until the right can be determined, if the right be the

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

subject-matter in dispute between the parties, or until the encumbrances have been cleared off, if the appointment has been made at the suit of an encumbrancer. *Where the right is the subject-matter in dispute, the receiver merely holds the property for whosoever may ultimately appear to be entitled to it.*" *Kerr on Receivers* 158, 159.

He refers to the case of *Evelyn v. Lewis*, 3 *Hare* 472, where the argument of Messrs. Cooper and Rolt, followed by the opinion of Vice-Chancellor Wigram, would seem to leave no room for doubt or dispute on this proposition. A note in the American edition says: "That a receiver represents the interests of all the parties in the property, and that it is his duty to protect it to the best of his ability for all those interested, although those interests may be various and conflicting or involved in doubt." See *Iddings v. Bruen*, 4 *Sandf. Ch.* 417; *Hutchinson v. Lord Massareene*, 2 *Ball & B.* 55; *Davis v. Duke of Marlborough*, 2 *Swans.* 125; *Delaney v. Mansfield*, 1 *Hog.* 234.

In the Maryland case, Chief Justice Buchanan says: "We have endeavored to show that this is a fair and *bona fide* assignment for a valuable consideration and passes the property from the bank and beyond its power or control. If so, and a similar assignment in England has the effect to protect the property against the king's *extent* and to defeat his priority (as we have seen it does), it has equally the effect here to protect the property in the hands of the trustees against common law priority of the state."

The vice-chancellor has, evidently, been led into error, by failing to observe the distinction drawn between a *valid assignment*, under a deed which has divested the insolvent of his property, by his own act, and the *possession of a receiver*.

In conclusion, it is insisted that the view taken by the vice-chancellor, that the assertion of this right of priority, on the part of the state, should be regarded as in antagonism to the cardinal objects of a government established by the people, for their common protection and security, is

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

founded on a misconception of the theory of the government. The prerogative in reference to his revenue was given to the king, at least in theory, not for his own good, but for the common good of his subjects. The *jus regium* in the shore and beds of navigable rivers he held for the benefit of his people. This section of the prerogative, Sir William Blackstone tells us, was one of the incidental prerogatives of the crown, having a relation to something else, *distinct from his person*—indeed, only an exception, in favor of the crown, to those general rules that are established for the rest of the community. “*Such as that no costs should be recovered against the king; that his debts should be preferred to any of his subjects.*”

The federal government of the United States, not having the power as a prerogative at common law, claimed it as an incident to the constitutional duty of collecting the public revenue and paying the public debt—the supreme court of the United States holding the act of congress constitutional on this ground alone. And the exercise of this right so acquired and denounced by the vice-chancellor as rigorous, has recently saved the federal government from heavy loss at the expense of all private creditors in the case of Jay Cooke, McCullough & Co.

South Carolina, upon the *dicta* of whose courts, repudiating the common law of England, the vice-chancellor based his opinion on this point, took care to provide, by special statute, for the priority of the sovereign's claim for taxes. The railroad tax law of our own state makes this lien for taxes paramount to mortgaged debts incurred prior to the assessment of the tax. Nearly every state in the Union which repudiated our common inheritance, was obliged, by necessity, to re-enact this sovereign prerogative by statute.

It is the duty of the attorney-general to insist that the taxes of the people of Middlesex county, deposited in the State Bank at New Brunswick, by the county collector, subject to the order of the state treasurer, were a sacred trust. It was the product of their labor, drawn from them by the

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

sovereign power, and it was under the protection of the common law which is their common heritage. If the tax be lost or stolen in its transmission to the treasury, the necessities of government require that it shall be replaced, and thus, for the benefit of a commercial institution or its creditors, established for purposes of private profit or engaged in speculation, the people will be obliged to submit to retaxation.

Mr. A. V. Schenck, for the receiver.

The State Bank at New Brunswick became insolvent March 31st, 1877, and a petition was filed by the board of chosen freeholders of the county of Middlesex, in the court of chancery, as creditors of the bank, for an injunction and the appointment of a receiver, under the act entitled "An act concerning corporations." (*Rev.* p. 175.) The chancellor granted the injunction, and appointed a receiver April 7th, 1877. George M. Wright, state treasurer, had at that time deposited in the bank, in his name, as treasurer, the sum of \$33,990. He subsequently (July 7th, 1877) filed his petition in chancery, claiming the right to be paid in full in preference to all other creditors of the State Bank, under an alleged state prerogative.

The principle is thus stated by Coke (*Co. Lit.* 131 (b)) : "The king, by his prerogative, regularly is to be preferred in payment of his duty or debt, by his debtor, before any subject, although the king's debt or duty be the latter, and the reason hereof is, for that *thesaurus regis est fundamentum belli, et firmamentum pacis*. And thereupon the law gave the king remedy, by writ of protection, to protect his debtor, that he should not be sued or attached until he paid the king's debt. But hereof grew some inconvenience, for, to delay other men of their suits, the king's debts were more slowly paid. And, for remedy thereof, it is enacted by the statute of 25 *Eliz.* 3, c. 19, that the other creditors may have their actions against the king's debtor, and proceed to

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

judgment, but not to execution, unless he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts. This kind of protection hath (as it appeareth) no certain time limited in it.

But in some cases the subject shall be satisfied before the king; for, regularly, whenever the king is entitled to any fine or duty by the suit of the party, the party shall be first satisfied, as in a *decies tantum*. And so, if, in an action of debt, the defendant denie his deed, and it is found against him, he shall pay a fine to the king, the plaintiff shall be first satisfied; and so in all other like cases. And so it is in bills preferred by subjects in the star-chamber; their costs and damages (if any be) shall be answered before the king's fine, as it is daily in experience."

And the prerogative seems to be based in part upon the maxim, "*Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet.*" *Co. Lit.* 30 (b); 9 *Rep.* 129 (b); *Broom's Leg. Max.* 69, marg. note; *Whart. Leg. Max.* 155, maxim 70; 1 *Bla. Com.* 238, 239, 240; 2 *Bla. Com.* 408, 409; 3 *Bla. Com.* 420, 421. And it is contended, on the part of the appellant, that this prerogative of the king forms a part of the common law, and, as such, has been introduced into this country and into this state.

First—It is denied, on the part of the receiver, that this prerogative of the king has been introduced as a part of the common law, either into this country or into this state.

1. The prerogative flows from feudal principles, is based upon the theory of a monarchical and despotic government, and is utterly inconsistent with a republican form of government established for the good of the people. It is not a *direct*, but only an *incidental*, prerogative (2 *Bla. Com.* 240), and as such is only an exception, "in favor of the crown, to those general rules that are established for the rest of the community." And where it comes in conflict with the well-established right of the citizen, it must yield. "The king's prerogative stretcheth not to the doing of any wrong." 1

Bla. Com. 238; *Fin. L* 84, 85. It applies particularly to the king's *income* or *revenue*, and provision is otherwise fully made for the revenue of this state. And it was evidently the intention of the legislature to abolish all revenue based upon *prerogative*, such as *forfeitures* for crimes, *deodands* and the like, which are governed by the same principle as the prerogative in question.

2. The *adjudicated legal effects* of this prerogative show it to be inconsistent with a government formed for the welfare of the people. Beside the instances given by the vice-chancellor in his opinion (2 *Stew.* 268), the attention of the court is called to the following:

(a). The king's judgment affects all land which the king's debtor had *at or after the time of contracting his debt*, whereas between subject and subject the general rule is that a judgment has relation only to the day when signed. 2 *Tidd P.* 1058.

(b). If the king's debtor is unable to satisfy the king's debt out of his own chattels, the king can betake himself to *any third person who is indebted to the king's debtor*, and can recover of such third person what he owes to the king's debtor, in order to get payment of the debt due from the latter to the crown. 2 *Tidd P.* 1056. And so the king can betake himself to the debtor of the debtor of the king's debtor, and so on *ad infinitum*. 2 *Tidd. P.* 1058.

(c). The king's debtor is *prevented from making any will* of his personal effects without the sanction of the crown. *Broom and Whart., ubi supra.*

(d). Upon a debt of record, or a specialty, the writ of extent issues at the instance of the king, *without any previous suit* or proceeding, except an affidavit that the debtor is insolvent and the debt is in danger of being lost. And a simple contract debt may be raised to a debt of record by simply issuing a commission to ascertain the amount due, *without notice to the debtor*. By virtue of the writ of extent the sheriff may break into the debtor's house, if admission be refused, either to *arrest him* or to seize his goods. His

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

lands may be also taken and sold. A debtor taken under this writ cannot be bailed, *nor will his discharge under bankrupt or insolvent laws release him.* 2 *Tidd P.* 1044, 1046, 1049; 3 *Blw. Com.* 420, 421. How can the last-named legal effect of this prerogative be reconciled with the provisions of the constitution of this state (Art. I, § 17), which declares that “no person shall be imprisoned for debt in any action, or on any judgment founded upon contract, *unless in cases of fraud?*” Or with the bankrupt laws of the United States? Or with the insolvent laws of this state? (*Rev.* p. 497, §§ 1, 2.)

Second—This prerogative has not been adopted as a part of the common law *by the United States.* *Rev. St. U. S.* 691, § 3466, *tit.* XXXVI, “Debts due by or to the United States,” which enacts: “Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied, &c.” *United States Bankr. Act*, § 28; *Bump’s Bankr.* (6th ed.) p. 482; 1 *Kent Com.* 242, *Lect. XII*; *United States v. Fisher*, 2 *Cranch* 358; *United States v. Hooe*, 3 *Cranch* 73; *Prince v. Bartlett*, 8 *Cranch* 431.

Third—This prerogative has not been adopted as a part of the common law *by any state* of the United States. When adopted it is by *local statute.* 1 *Kent Com.* (10th ed.) 248, *note* (c); *Commissioners &c. v. Greenwood*, 1 *Desauss.* 450, and *Appendix* 599; *State v. Harris*, 2 *Bailey* 598; *Keckley v. Keckley*, 2 *Hill (S. C.) Ch.* 250–6; *State Bank v. Gibbs*, 3 *McCord* 377. And this was the fact in the state of Maryland, notwithstanding the language of the court in the case of *Maryland v. Bank of Maryland*, 6 *Gill & J.* 205, as appears by the case of *Davidson v. Clayland*, 1 *Har. & J.* 546, and the cases there referred to. The statute was passed in Maryland in 1778.

Fourth—This prerogative has not been adopted as a part of the common law *in this state.*

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

1. If this prerogative has any existence in this state, it exists in its strict common law form, not modified by statute, for all English statutes are declared no longer of force in this state. *Pat.* p. 436, § 4. And therefore any citizen indebted to the state is entitled to the state's writ of protection, as above.

2. There is no record, or other evidence, that this prerogative has been claimed by or allowed to the state of New Jersey since the establishment of the government thereof.

3. "Upon the revolution, all royal rights vested in the people of New Jersey, as the sovereign of the country, and are now in their hands; and they, having themselves both the legal estate and the usufruct, may make such disposition of them, and such regulation concerning them, as they may think fit; and this power of disposition and regulation can be exercised only by the legislative body, who are the representatives of the people for this purpose." *Arnold v. Mundy*, 1 *Hal.* 13, 78.

4. The whole course of legislation in this state is a renunciation of this prerogative, repudiates the doctrine, and is entirely inconsistent with its existence. This manifestly appears by reference to the following statutes:

(a). "An act respecting suits for the recovery of moneys due to the state," passed February 28th, 1820 (*Nix. Dig.* (4th ed.) 1000, §§ 19, 20), makes it the duty of the treasurer and secretary of state, in cases appertaining to their respective offices, *to commence suits*, in the name of the state of New Jersey, in the supreme court, for the recovery of all sums of money now due or which may hereafter become due to this state, *and the same to prosecute to final judgment and execution*. This statute repudiates the summary procedure by *writ of extent*, without suit or judgment. It directs proceedings *by suit* to be instituted in all cases where money is due to the state, and judgment and execution as in ordinary cases. The provisions of the constitution of this state (Art. I, § 17) apply in full force to all proceedings under this statute. Hence, *the arrest* of the state's debtor,

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

in all cases, and without regard to "cases of fraud," is clearly repugnant to the constitution.

(b). "An act providing for the collection of fines and costs," approved March 18th, 1851. *P. L.* 348; (*Nix. Dig.* (4th ed.) 226, § 41.) "Whenever judgment shall be rendered upon any indictment in the supreme court, or any of the courts of oyer and terminer and general jail delivery, or courts of quarter sessions of the peace of this state, *such proceedings may be had thereupon* for the purpose of obtaining satisfaction of the fine and costs, or costs adjudged, by writ or writs of *fieri facias*, in the like manner and to the same effect as in civil cases." Here is a debt adjudged to be due to the state, and yet the remedy for the collection thereof is by a writ of *fieri facias*, in the like manner and to the same effect as in civil cases. The king's right to the "writ of extent," with its legal effects, is repudiated by this statute.

(c). "An act concerning the estate of persons who die insolvent," approved April 16th, 1846. *Nix. Dig.* (4th ed.) 421, § 10; *Pat.* 435; *R. L.* 766; *Elmer's Dig.* 169; *R. S.* 346; *Rev.* p. 770, § 81; 4 *Grif. Law Reg.* 1281, note (2). This statute declares certain preferences, yet does not give any to the state. It directs distribution, without any preference to the state.

(d). "An act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," approved April 16th, 1846. *R. S.* 316; *Nix. Dig.* (4th ed.) 32, § 1; *Rev.* p. 36, § 1. Here is an act of the legislative department, approved by the executive (see 11 *Rep.* 70), which sanctions the assignment by the debtor, and expressly declares, in the most positive terms, that *there shall not be any preference by one creditor over another*, and that *any* such preference shall be *fraudulent and void*. Language cannot be more explicit than this. How, then, can it be held that this prerogative exists in this state?

Prerogative consists in the discretionary power of acting for the public good where the positive laws are silent. 1 *Bla. Com.* 252.

(e). "An act for the relief of persons imprisoned on civil process." (*Rev.* p. 497.) That part of the act on page 503, § 20, relating to distribution of the effects of the insolvent.

(f). "An act to prevent frauds by incorporated companies," approved April 15th, 1846. *R. S.* 129; *Nix. Dig.* (4th ed.) 408, § 15; *Rev.* p. 191, § 80. See, also, *P. L.* 1877, p. 74. This act directs the distribution of the fund without recognizing any preference on the part of the state.

5. The leading decisions of the court of chancery in the construction of the "Act to prevent frauds by incorporated companies," preclude any such doctrine as preference on the part of the state. *Coryell v. New Hope Del. Bridge Co.*, 1 *Stock.* 457; *Van Wagenen v. Puterson Savings Bank*, 2 *Stock.* 13; *Wells v. Rahway White Rubber Co.*, 4 *C. E. Gr.* 402.

6. The state is bound by these statutes by *necessary implication*, and no other conclusion can be deduced from them than that the legislative and executive departments of the state (11 *Rep.* 70) intended to abrogate the alleged prerogative. 1 *Kent Com.*, (10th ed.) 460; *Van Kleck v. O'Hanlon*, 1 *Zab.* 588; 1 *Bla. Com.* 262. "The act which provides a necessary and profitable remedy for the preservation of right and to suppress wrong, shall bind the king." *Magdalen College case*, 11 *Rep.* 72.

7. The proceeds of the estate of the *testator*, as well as of the *intestate*, are, by the act relating to insolvent estates, ordered to be equally distributed among creditors as therein directed; thus repudiating the doctrine that the state's debtor cannot make a will of his personal effects without the sanction of the state. *Supra*, p. 336.

8. *Morrow v. Dows*, 1 *Stew.* 459. In this case, it is held by the court that there is not any priority on the part of the state, even in case of taxation, unless by lien created by express legislation.

Fifth—Conceding, for the sake of argument, that this prerogative does exist in this state, yet it does not apply to this case.

Freeholders of Middlesex Co. v. State Bank at New Brunswick.

1. If not by the *express language* of the "Act to prevent frauds by incorporated companies," (*Rev.* p. 189, § 72, p. 191, § 77), certainly by *necessary implication*, the property of the insolvent corporation, on the appointment of a receiver, is vested, by operation of law, in the receiver, for the purposes of the act, and for the benefit of the corporation.

2. In this view only can the decisions in this state, on this subject, be reconciled with principle. *Willink v. Morris Canal and Banking Co.*, 2 *Gr. Ch.* 400; *Corrigan v. Trenton Del. Falls Co.*, 3 *Hal. Ch.* 489. Rents accruing after appointment belong to receiver. *Suydam v. Receivers &c.*, 2 *Gr. Ch.* 114. Receiver may ratify a sale made by the company after insolvency. *Knott v. Receivers &c.*, 4 *C. E. Gr.* 423. Receivers are not like executive officers, bound to sell for the highest price. *Klein v. Jewett*, 11 *C. E. Gr.* 474. To test the liability of the receiver the same rules must be applied as if the corporation were the actual party defendant before the court. And see, also, *P. L.* 1852, p. 397; *Rev.* p. 192, § 88.

3. This transfer of property to the receiver, for the purposes declared in the act, under the legislative and executive sanction of the state, must be deemed a *waiver* of any pretended preference on the part of the state.

4. The state, in and by this act, places itself on the same footing as other creditors of the corporation.

5. The transfer of property to the receiver, for the purposes of the act, is as effectual as if made by *deed of assignment*; in which case the prerogative would be lost. *Maryland v. Bank of Maryland*, 6 *Gill & J.* 205; *Thelusson v. Smith*, 2 *Wheat.* 396; *Wilcox v. Waln*, 10 *Serg. & R.* 380; *United States v. Mechanics Bank*, *Gilp.* 51.

Sixth.—This is not the action of the state in its sovereign capacity to enforce its prerogative, but a petition filed by George M. Wright, esq., state treasurer. In this case there has not been any suit brought in the name of the state, under the act of February 28th, 1820 (*supra*); no judgment recovered; no writ of extent or execution issued. There

Cubberly v. Glading.

has been nothing done *in the name of the state* to manifest the intention of the state to enforce its priority or prerogative, and to attach the lien thereof upon the fund or property. Now, the only *concurrence* of right as to the state and a citizen, under the eightieth section of the act (*Rev. p. 191*) is in case where the state has a judgment (or mortgage) and a citizen has a judgment (or mortgage).

In all other cases, by the express direction of the act, the fund is to be *proportionally* distributed. It is in contemplation of the legislature that the state shall *sue* and recover a *judgment* for any debt due it, the same as a citizen. Hence it follows that the state, not having recovered any judgment, is not entitled to be placed even among the preferred creditors recognized by the act.

Seventh.—In view of the statutes: *Nix. Dig.* 998, §§ 1, 3, —999, § 11, it becomes a grave question, whether, in the application of the rigid rules of an alleged state prerogative, George M. Wright is not *the state's debtor* to the amount of the deposit in question, instead of the insolvent corporation.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the vice-chancellor in the case below.

DELERHE P. CUBBERLY and others, appellants.

v.

WILLIAM GLADING, respondent.

Mr. B. D. Shreve, for appellants.

Mr. F. Voorhees, for respondent.

Lyon v. Bower.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the chancellor in the case below, 2 *Stew.* 104.

DANIEL M. LYON, appellant,

v.

FREEMAN BOWER, respondent.

Messrs. Coult & Howell, for appellant.

Mr. Ludlow McCarter, for respondent.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the chancellor in the case below, 2 *Stew.* 110.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY,
FEBRUARY TERM, 1879.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

THE ESTERBROOK STEEL PEN MANUFACTURING COMPANY

v.

SIMEON J. AHERN.

1. After a final decree on a default, and an order to account had been entered on a bill to redeem certain securities, the defendant was adjudged a bankrupt, and an assignee appointed.—*Held*, that the suit was not thereby abated; that it was not the duty of the complainants to make such assignee a party, but that if the assignee desired to appear in the suit it was his duty to apply for leave to be substituted for the defendant.—*Held*, also, accordingly, that he was bound by the proceedings.

2. A petition, filed by a stranger to the suit, claiming the payment of moneys paid into court in the cause, to satisfy a judgment recovered

NOTE.—A state court is not required to notice judicially that proceedings in bankruptcy have been instituted by or against parties to a suit pending therein. *Eyster v. Graff*, 1 *Otto* 521, 3 *Cent. L. J.* 251, *note*; *Irving v. Irving*, 14 *Nat. Bk. Reg.* 289; *Baum v. Stern*, 1 *Rich. (N. S.)* 415;

 Esterbrook Steel Pen Manufacturing Co. v. Ahern.

by him against the defendant in a foreign state, dismissed on the ground that the petitioner, not being a party to the suit, had no standing and could have no relief therein, and that the proceeding for the purpose should be by bill.

Bill for account, &c. On petition of the Elizabethtown Savings Institution that the amount decreed to be due to the defendant from the complainants, and by them paid into this court, be paid over to the petitioners on account of a judgment recovered by them against the defendant, Simeon J. Ahern, in the state of New York; in supplemental proceedings whereon it was ordered by a judge of the supreme court of that state, on the 2d of March, 1878, that the amount due from the complainant to the defendant in the accounting in this suit be paid to the petitioners in part payment of the amount due them on that judgment. Also on petition of James J. Gerber, assignee in bankruptcy of the defendant, Ahern, to be admitted as a defendant, and that the cause may be reheard.

Mr. H. Wallis, for the Elizabethtown Savings Institution.

Mr. W. P. Wilson, for the assignee in bankruptcy.

THE CHANCELLOR.

The decree for an account in this cause was made on the 8th of January, 1878. The master's report of the account

Woolfolk v. Gunn, 45 Ga. 117; *McGready v. Harris*, 54 Mo. 137; *Doe v. Childress*, 21 Wall. 642; *Fehley v. Barr*, 66 Pa. St. 196; *Kent v. Downing*, 44 Ga. 116; *Cutter v. Evans*, 115 Mass. 27; *Haber v. Klauberg*, 3 Mo. App. 342; *Johnson v. Bishop*, 1 Woolw. 324; *Hewett v. Norton*, 1 Woods 68. See, however, *Taylor v. Bonnett*, 38 Tex. 521; *Lewis v. Fisk*, 6 Rob. (La.) 159; *Foster's Case*, 2 Story 131; *Bradley v. Frost*, 3 Dill. 457. Although some of the older cases in New York (following the English practice, 1 Dan. Ch. Pr. 159) hold that the suit abates by the appointment of such assignee. *Anonymous*, 10 Paige 20; *Penniman v. Norton*, 1 Barb. Ch. 246; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *Storm v. Davenport*, 1 Sandf. Ch. 135; *Lowry v. Morrison*, 11 Paige 327. See, however, *Lenihan v. Humann*, 14 Abb. Pr. (N. S.) 274, 55 N. Y. 652; *Allen's Case*, 1 N. Y. Leg. Obs. 115; *Raymond v. Johnson*, 11 Johns. 488; *Gale v. Vernon*, 1 Sandf. 679.

Esterbrook Steel Pen Manufacturing Co. v. Ahern.

was made on the 28th of May following. By the decree entered thereon it was ordered and adjudged that the complainants pay into this court the amount found to be due from them to the defendant, on the accounting, less the amount of their taxable costs of this suit; and that, on the production to the defendant of the clerk's receipt therefor, the complainants were entitled to have and receive from the defendant all notes, checks, drafts and other evidences or debt received from them by him, as alleged in the bill of complaint, and that he forthwith deliver them up accordingly. The last-mentioned decree was made on the 25th of June, 1878. The defendant was adjudged a bankrupt on the 16th of April, 1878, and James J. Gerber was appointed his assignee, and accepted the appointment on the 20th of May following. As before stated, the master's report was made on the 20th of May, 1878, and the decree upon the accounting on the 25th of June, 1878, both after the appointment of the assignee.

The adjudication in bankruptcy and the appointment of the assignee were made pending the accounting. The complainants could not regularly or effectively proceed with the suit, after the appointment of the assignee, without bringing him in. Where a party, who is a defendant to a suit, becomes bankrupt, it will be necessary for the complainant, if he proceeds with the suit, to bring the assignee before the court by supplemental bill. 1 *Dan. Ch. Pr.* 159 (4 *Am.*

For the proper steps where one of two defendants becomes a bankrupt, see *Gibson v. Green*, 45 *Miss.* 209; or, one of two plaintiffs, *Murray v. Murray*, 5 *Johns. Ch.* 60.

Mere bankruptcy of a party pending a suit in a state court, is not sufficient ground for withdrawing such suit therefrom into the United States court. *Samson v. Burton*, 5 *Ben.* 325; *Haber v. Klauberg*, 3 *Mo. App.* 342; see *Southern v. Fisher*, 6 *Rich. (N. S.)* 345, 350; *Reed v. Bullington*, 49 *Miss.* 223; *Stanley v. Sutherland*, 54 *Ind.* 339. It is no ground for a nonsuit that the plaintiff has been adjudged a bankrupt since the suit was begun. *Wooddail v. Holliday*, 44 *Ga.* 18; or for abating the suit, *Noonan v. Orton*, 34 *Wis.* 259.

For the mode of prosecuting an appeal or writ of error in such case, see *Dormire v. Cogley*, 8 *Blackf.* 177; *O'Neil v. Dougherty*, 46 *Cal.* 575; *Alston v. Wingfield*, 53 *Ga.* 18; *Herndon v. Howard*, 9 *Wall.* 664; *Collins v.*

Esterbrook Steel Pen Manufacturing Co. v. Ahern.

ed.); *Mitf. Eq. Pl. by Jeremy* 66-68; *Deas v. Thorne*, 3 *Johns.* 551; *Williams v. Winans*, 5 *C. E. Gr.* 392. The bankrupt law confers on the assignee power to prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, in his own name, in the same manner and with the like effect as they might have been prosecuted or defended by the bankrupt.

It may be remarked that the decree in this case, made after the appointment of the assignee, requires the defendant to deliver up certain notes, checks, drafts or other evidences of debt, although all the defendant's interest therein had passed over to the assignee, and when the decree was made the defendant had no control over it. It is enough, however, to say that the proceedings from the time of the appointment of the assignee are not regular, and are not binding on him.

The petition of the Elizabethtown Savings Institution, therefore, cannot be entertained. Its merits will not be considered. It will be dismissed.

The assignee has a right to be admitted as a defendant on his application. *Herndon v. Howard*, 9 *Wall.* 664; *Devaynes v. Morris*, 1 *Myl. & Cr.* 213. And he may apply by petition. *Melick v. Melick's ex'r*, 2 *C. E. Gr.* 156. His

Marshall, 10 *Rob. (La.)* 112; *Haggerty v. Morrison*, 59 *Mo.* 324. Where the bankrupt died after the appeal was taken, *Moffit v. Cruise*, 7 *Cold.* 137; where a substituted assignee died, *Avery v. Ryerson*, 34 *Mich.* 362.

If the assignee desires to be substituted, he must show that some right or interest of the bankrupt's estate will be affected (*Fritsch v. Van Mitterdorf*, 2 *Cin.* 261; *Gunther v. Greenfield*, 8 *Abb. Pr. (N. S.)* 191; *Streeter v. Sumner*, 11 *Fost.* 542; *McHenry v. La Societe &c.*, 5 *Otto* 58); and elect to be made a party within a reasonable time (*Smith v. Gordon*, 2 *N. Y. Leg. Obs.* 325; *Home Ins. Co. v. Hollis*, 53 *Ga.* 659).

The assignee should apply by petition (*Eyster v. Graff*, 1 *Otto* 521); or by an original bill in the nature of a supplemental bill (*Northman v. Liverpool Ins. Co.*, 1 *Tenn. Ch.* 312); and not by motion founded on affidavits (*Fellows v. Hall*, 3 *McLean* 487; *Hecht v. Wassell*, 27 *Ark.* 412; *Stone v. Brookville Bank*, 39 *Ind.* 284). The decision of the state court will be binding on him (*Mays v. Fritton*, 20 *Wall.* 414; *Rowe v. Page*, 54 *N.H.* 190), and the assignee personally liable for costs (*Reade v. Waterhouse*, 12 *Abb. Pr. (N. S.)* 255, 52 *N. Y.* 587).—REP.

Cooke v. Watson.

petition will be granted, and he will be made a party defendant, to the end that the cause may be reheard, unless, within ten days from the time of entering the order on this decision, the complainant shall apply to vacate the proceedings subsequent to the assignment, and to make the assignee a party defendant.

WATTS COOKE, receiver, &c.,

v.

WILLIAM G. WATSON and others.

Lands owned by a partnership were sold to a corporation consisting mainly of the partners. No deed was executed, but possession was taken and improvements made by the corporation. In a suit by a receiver of the corporation to compel a formal conveyance for the benefit of the creditors,—*Held*,

(1) That a mortgage on the premises, duly authorized by the corporation, but in fact executed by the former owners (the money derived therefrom was in fact expended by and for the benefit of the corporation), was an encumbrance thereon from the date of its execution.

(2) That a mortgage given by the corporation (before the conveyance) was also an encumbrance.

(3) That a judgment recovered against one of the partners, after the premises had been sold to the corporation and possession openly taken by it, was not, in equity, a lien thereon.

(4) That although in ordering the partners to execute a formal conveyance, the wife of one, entitled to dower, could not be compelled to join therein, yet her husband, having received a full consideration and being bound to give a title clear of encumbrance, might be decreed to indemnify the corporation against her claim, unless she voluntarily relinquishes it.

Bill for relief. On final hearing on pleadings and proofs.

Mr. A. B. Woodruff, for complainant.

Mr. H. A. Williams and *Mr. W. Pennington*, for First National Bank of Paterson.

Cooke v. Watson.

Mr. Frelinghuysen, for Equitable Life Assurance Society.

Mr. J. C. Paulison, for Westray & Gibbs, judgment creditors of W. G. Watson.

THE CHANCELLOR.

The Watson Manufacturing Company, a corporation under the laws of the state, and located at Paterson, was organized about the 1st of April, 1866. William G. Watson and James Watson were its principal stockholders. Of the 5,682 shares of its stock which were subscribed for, each owned 2,800. They had been, previously to the organization of the company, and up to that time, carrying on together, as partners, under the firm name of W. G. & J. Watson, the business for which the corporation was created, on premises in Paterson owned by them. Each paid for his share of the stock the amount of the par value thereof, \$144,000, by a duly accepted draft upon the firm of W. G. & J. Watson, which was received by the corporation in payment of the price of the shares. The firm of W. G. & J. Watson ceased to do business after the organization of the company. At a special meeting of the board of directors of the company, held July 28th, 1866, at which both of the Watsons were present, a resolution was unanimously passed empowering the president (William G. Watson) to purchase the establishment, including the real estate, book debts &c. of the firm of W. G. & J. Watson, on behalf of the company, for the sum of \$300,000. Under and by virtue of this resolution the company, through William G. Watson, its president, immediately afterwards purchased the property of the firm. It included three tracts of land in Paterson, one being lots numbers 16, 17, 18, 19, 20 and 23, in block N of map H of the Society for Establishing Useful Manufactures; another being three hundred and twenty-five feet front on Dale avenue, with the same front on Railroad avenue, and two hundred feet deep, and the other, consisting of four lots, immediately adjoining that tract on the southerly side.

Cooke v. Watson.

Of those lots two were on Dale avenue and two on Railroad avenue, and they were numbered 14, 15, 26 and 27. The entire establishment, real estate, book debts &c., was valued and sold to the company at the price of \$295,157.02, of which \$200,000, or about that sum, was the price of the real estate. The Watsons were each, on or about the 31st of May, 1866, credited on the books of the company with the sum of \$147,578.51, for and in payment of one-half of the price of the establishment so sold to and bought by the company. They immediately thereupon delivered possession of the establishment, including the real estate, to the company, which had possession of it as owner from that time up to the time (June 15th, 1876,) when the complainant was appointed receiver for its creditors and stockholders, by this court, under proceedings in insolvency.

Two fires occurred on the premises, one in 1873 and the other in 1875. At the first, all the buildings were burnt down; they were rebuilt by the company. At the other, very considerable damage was done to the buildings, which was repaired by the company. The buildings were very extensive and costly. When the first fire occurred (and, for aught that appears, when the last took place, also) the buildings were insured in the name of the company and as its property. On the 20th of April, 1869, the company being desirous of borrowing money—\$25,000 to be used in building on the property—the board of directors adopted a preamble and resolution, stating that the company was about to obtain a loan from the Equitable Life Assurance Society of New York for \$25,000, and authorizing the president to execute, in the name of the company, a bond and mortgage to secure that amount, with interest, on the land of the company. The land which it was proposed to mortgage to the life assurance society, under the resolution, was the tract before mentioned of three hundred and twenty-five feet front on Dale avenue, with like front on Railroad avenue. It was then discovered that the company either never had had any deed for that property from the Watsons, or, if one had

Cooke v. Watson.

been made, it had not been recorded and could not be found. The Watsons, therefore, with the wife of William (James was then a widower), executed a mortgage on that property to the life assurance society, to secure the \$25,000 and interest, for which the Watsons gave their bond. The mortgage is dated on the 1st of April, 1869, and was recorded on the 29th of that month. The principal of it is still unpaid. The money borrowed on the security of the bond and mortgage went into the treasury of the company, and was expended in building on the property.

On the 5th of December, 1871, the company being desirous of borrowing \$10,000 of the trust funds held by this court on security of mortgage of the above-mentioned lots, numbers 14, 15, 16, 17, 18, 19, 20, 23, 26 and 27, those lots were, by deed of that date executed by the Watsons and their wives (James had then married again), conveyed in fee to the company, and the company afterwards, on the 24th of May, 1872, executed to the chancellor, to secure the payment of \$10,000 and interest, its bond and a mortgage on the property so conveyed. The principal of that mortgage also is still unpaid.

On the 1st of June, 1874, the company mortgaged to the First National Bank of Paterson the whole of the property to secure the payment of \$24,103.02, according to the tenor and effect of a promissory note of the company of that date for that sum, payable three months after date, to the order of the Watsons, by whom it was endorsed. That note fell due on the 4th of September following, and a check for the amount of it was then drawn by the company upon the mortgagee, with which the company kept its bank account and transacted its bank business. The check is in the hands of the receiver, bearing upon it the mark of having been paid by the mortgagee, and the amount of it was charged against the company and credited to the bank on the books of the latter. The body of it is as follows :

“Pay the mortgage note of Wm. G. and James Watson twenty-four thousand one hundred and three 02-100 dollars.”

Cooke v. Watson.

The note was not delivered up, however, but was retained and is still held by the bank. The bank insists that \$20,000 of the principal of the note is unpaid, with interest from June 19th, 1876. On the 10th of August, 1876, Fletcher Westray and Alfred H. Gibbs recovered a judgment in the supreme court of this state against Edward J. Watson, William R. Edwards and William G. Watson, for \$684.97, the greater part of which is, as they allege, unpaid. On the 19th of the same month the National State Bank at Newark recovered judgment in the same court against the North Belleville Quarry Company and William G. Watson for \$1,908.19. No levy was made on any of the lands before mentioned, on either of those judgments.

The complainant, by his bill, prays that the Watsons and their wives may be decreed to convey the land mortgaged to the life assurance society to the company, as of the date of May 31st, 1866, which is prior to the date of that mortgage, or as of such other day as to the court may seem proper; that the liens thereon, if any, may be settled by this court, and the complainant decreed to hold the property subject only thereto; that the Watsons and their wives may be decreed to perform specifically the agreement for the sale of that land, and give legal effect to the sale thereof to and the purchase by the company, in such manner and on such conditions and subject to such liens and encumbrances as to this court may seem proper. And that the land may be declared to be free from all other liens or encumbrances of or in favor of the defendants or either of them. The First National Bank of Paterson had, when this suit was begun, brought an action, which was then pending in the supreme court, against the Watsons as endorsers on the note. The bill prays an injunction against the bank, restraining it from proceeding therein, on the ground that the note was paid by the check before mentioned. It also prays an injunction against all the defendants to prevent them from conveying away or encumbering the land in

Cooke v. Watson.

question. The life assurance society, the bank, and West-ray & Gibbs answered, but none of the other defendants.

It is established by the proof that the company purchased from the Watsons the property in respect to which this suit is brought, and paid them the purchase-money, and that, from the time of the purchase up to the time when the receiver was appointed, it was in full, open and notorious possession of it as owner. It appears probable that no deed was ever given for it to the company. The Watsons both say that they did not suppose that a deed was necessary to the transfer of the property from them to the company, and that they supposed that whatever papers were necessary for the transfer had been executed. If no deed was executed it was merely through oversight. On the payment of the purchase-money to them, the equitable title to the property passed to the company, and they were merely trustees of the legal title for it. They neither have nor have they ever claimed to have any equitable title to the property since the sale, but on the other hand have always since then recognized the company as the owner. They therefore will be decreed to convey it to the company, but their deed will not be decreed to take effect as against the mortgage of the life assurance society at a day anterior to the date of that mortgage. That mortgage is a valid encumbrance upon the property in the hands of the company. Not only did the company negotiate the loan, but it agreed to secure the payment of it by mortgage on this property, and instructed William G. Watson, its president, to execute such mortgage accordingly. The mortgage was not executed by the company, but by those who were its trustees of the legal title. And, moreover, it is proved that the company received the money borrowed and expended it in building upon its property. The life assurance society, by its mortgage, has the pledge of the legal title as security for the payment of its debt and interest. There is no ground for disturbing or injuriously affecting it. The society is entitled to the protection of equity. Although as to the property mortgaged

Cooke v. Watson.

to the life assurance society, the bank has the mortgage of the holders of the equitable title merely (for the legal title was, when that mortgage was made, in the Watsons, and the mortgage was executed, not by them, but by the company), the mortgage of the bank is valid and effectual as between the mortgagor and mortgagee, to pledge the equitable title of the former. *Sinclair v. Armitage*, 1 *Beas.* 174.

But it is insisted on the part of the complainant, that that mortgage, if originally valid, has no validity now because it has in fact been satisfied. By the terms of its proviso it was made to secure the payment of the note therein mentioned. The complainant insists that the note was paid by the check before mentioned, given by the company for the amount of the note, on the 4th of September, 1874, and which, as before stated, appears to have been marked by the bank as having been paid by it. The evidence is clear that only part of the amount of the note was paid, and that there still remains due upon it the sum of \$20,000, with interest from June 19th, 1876. The check was given for the purpose of "taking the note out of the account on the books of the bank," as one of the bank officers expresses it. That is, it was given to answer to the amount of the note on the books of the bank, in order that on the books it might appear (but only appear) to pay the note. The money for the payment of the check was derived from the discount of two other notes given by the company in renewal of that note, and the debt was as much unpaid after the check was given as it was before. Moreover, it was understood and agreed between the company and the bank that the note was still to be held by the latter as evidence of the debt, and that renewals should from time to time be made, and the original note, except so far as it might be paid by paying the notes given in renewal or by other actual payments, was still to stand as evidence of the debt secured by the mortgage. Such an arrangement was valid and effectual, and will uphold the mortgage security until the debt shall have been in fact fully paid. *Robinson v. Urquhart*, 1 *Beas.* 515;

Cooke v. Watson.

Freeholders of Middlesex v. Thomas, 5 C. E. Gr. 39; *Teed v. Carruthers*, 2 Y. & C. 30.

Of the judgment creditors only Westray & Gibbs have answered. They insist that their judgment is a lien on the premises in question, and that no conveyance should be ordered, to the prejudice of their lien. It is worthy of remark that it does not appear, and they do not allege, that they gave credit to William G. Watson on account of his supposed ownership of the property. The company was in open and notorious possession of the property, and had paid all the purchase-money, when their debt was contracted, which was in December, 1874, and William G. Watson was not in possession of any part of the property at that time, though he and his son had occupied part of it under the company prior to October, 1873. The possession of the company was notice to Westray & Gibbs of its claim of title. *Baldwin v. Johnson*, Sax. 441; *Bliss v. Havens*, 11 C. E. Gr. 363; *Johns v. Norris*, 12 C. E. Gr. 485, 487, 488.

At law a judgment is a general lien upon all the legal interest of the debtor in his real estate, but in chancery that general lien is controlled by equity so as to protect the rights of those who are entitled to an equitable interest in the lands or in the proceeds thereof. *White v. Carpenter*, 2 Paige 217, 267.

Westray & Gibbs's claim of lien cannot prevail against the equity of the company. The wife of James Watson has no claim to dower in the property. The property was sold by her husband and the purchase-money paid and possession given to the purchaser before her marriage. 1 *Scribner on Dower* 564. The wife of William G. Watson has a claim of inchoate dower in this property, but only in the equity of redemption. She was his wife when the contract for sale was made, but she signed and duly acknowledged the mortgage to the life assurance society with her husband. There will be a decree for specific performance, in accordance with the views which I have expressed, against William G. Watson and James Watson. No decree will be made against

Randall v. Vroom.

the wife of the former (*Reilly v. Smith*, 10 C. E. Gr. 538), but her husband will, under the circumstances, be decreed to indemnify the company against her claim, unless she voluntarily relinquishes it.

The injunction against the bank and the life assurance society will be dissolved. That issued against the Watsons and their wives, and Westray & Gibbs, and the State Bank at Newark, will, as to all of them, except the wife of William G. Watson, be made perpetual.

The life assurance society and the Paterson bank are entitled to costs out of the funds in the hands of the complainant as receiver. No costs are awarded to or against Westray & Gibbs or the Newark bank. The complainant is entitled to costs as against William G. and James Watson.

GEORGE D. RANDALL and others

v.

PETER D. VROOM and others.

1. To sustain a conveyance, sought to be set aside because intended to defraud creditors, the consideration must be both good and *bona fide*.

2. A conveyance of an undivided half of a farm made by a debtor to his sisters (who owned the other undivided half), three days after the service of a summons on him, the only consideration being their assumption of the encumbrances thereon, which were less in amount than the actual value of the debtor's interest,—*Held*, to fall within the rule, and the conveyance ordered to be set aside as against the creditor.

Bill for relief. On final hearing on pleadings and proofs.

Mr. John A. Cobb, for complainants.

Mr. A. A. Clark, for defendants Jane and Martha Vroom.

Randall v. Vroom.

THE CHANCELLOR.

The complainants, judgment creditors of Peter D. Vroom, by their bill call in question the *bona fides* of a conveyance made by the judgment debtor to his sisters, Jane and Martha Vroom, of his interest (one-half) in a farm of one hundred and thirteen and twenty-six hundredths acres in Somerset county. The sisters owned the other half of the property. It was an excellent farm. They and his family lived upon it. It was tilled by Peter's son, who was about eighteen years of age, and a man hired by the sisters. Peter's half of the farm was subject to two mortgages, one given September 6th, 1867, to Gertrude M. Voorhees for \$2,000, with interest, the other for \$1,050, with interest, given April 1st, 1875, to Gilbert L. and John Ammerman, and also a judgment recovered October 29th, 1875, against him by confession, by the administrators (his brother Jacob and brother-in-law Isaac L. Pittenger) of his mother, for \$1,110.84, debt, besides costs. Under the execution on that judgment a levy had been made on Peter's interest (one-half) in the personal property on the farm. His interest was appraised, in the appraisal which was made with a view to the exemption to which he was entitled under the statute, at \$566.50.

On the 2d of February, 1876, the complainants began a suit by summons, returnable on the 14th of that month, against him in the supreme court. The summons was served on him on the 4th of that month, and on the 20th of March following a judgment in favor of the complainants was entered against him in that suit for \$1,023.52. An execution against goods and lands was issued on the judgment on the same day, and under it a levy was made upon his interest in the farm. By deed of the 7th of February, three days after the service of the summons on him, he conveyed his interest in the farm to his two sisters, Jane and Martha, for the consideration, as expressed in the deed, of \$4,000. The consideration was, as appears by the deed, their assumption of the mortgages and the amount due on the judgment to the administrators of his mother; which

Randall v. Vroom.

amount was in the deed said to be \$768.52. Under the execution on that judgment, Jane and Martha, on the 16th of March, 1876, sold all his interest in the personal property before mentioned, and, through Pittenger, bought it for \$230.81. The complainants file their bill to set aside the conveyance of Peter's interest in the farm.

That the conveyance was made at a time and under circumstances calculated to excite suspicion as to its *bona fides*, is most manifest. Peter had been sued by the complainants for a large debt. The conveyance was made to his two sisters, his co-tenants in common of the farm. They paid him nothing for it. There was no reason which would have induced him so to dispose of the property at that time except the suit. His sisters indeed say that their reason for acquiring the title to his interest in the property was, that he was careless and inattentive to the farm, and had become intemperate in his habits, but this, while it may have constituted a good reason why they were desirous of obtaining his interest, would not have been likely to have been regarded by him as an inducement for transferring to them all his interest in the property, without consideration, except the assumption of the payment of the encumbrances on it, and so giving to his sisters the means of putting his family out of doors. In this connection it is worthy of remark that, shortly before the complainants began their suit against him, the sisters had sent their brother Jacob to him, at Orange, to ascertain at what price he would sell his interest in the farm to them, and he then refused to sell at a lower valuation than ninety dollars an acre, or about \$5,000 for his interest in the farm, not including his interest in the personal property, which latter interest he swears was worth \$600 or \$700. He swears that his interest in the farm was worth \$7,000; that after the summons was served in the complainants' suit, his sisters, his brother Jacob, and his brother-in-law Pittenger, advised him to convey the property to his sisters Jane and Martha; that he did so; that they gave him nothing for it; that he conveyed it to them because he

Randall v. Vroom.

was "in a tight place," and they advised him to do it; that his brother and sisters advised him to sell it before the sheriff should come to levy under an execution on the judgment, which the complainants would get; and he says that they said that they thought by that means the complainants would be prevented from "getting anything" on their judgment in their suit. He says, again, that he had no other land, and that he conveyed the property in question because he was advised to make the conveyance to his sisters before the complainants could levy upon it, and that the object was to defeat the complainants in obtaining execution of their judgment, when it should have been recovered, and that if it had not been for the complainants' suit he would not have made the conveyance at that time; that his sisters never said anything about the conveyance until the complainants sued him, and that he never would have conveyed it in the way he did, if it had not been for the suit.

The defendants, Jane and Martha, by their answer (though it is under oath, the bill required answer not on oath,) allege that they had no knowledge or information when the conveyance was made that the complainants had brought a suit against Peter. Peter, however, not only swears, as before stated, that they did know of it, but, leaving out of consideration the testimony of Peter's son and Liebold, Jane herself (she of the two sisters appears to have had most to do with the conveyance), though she denies it in her testimony, does so, at first, only in a qualified manner. She says she does not *think* she had any knowledge that Peter had been sued by Randall and Lamb, and she adds that Peter had said very little to her about it. And here it may be remarked that, though she swears that Pittenger and her brother Jacob had nothing to do with the agreement between her and Peter, Pittenger, who is a witness for her and her sister, swears, testifying in reference to the personal property, that at the time Jane and Martha bought the farm, he told them that if they bought the farm

Randall v. Vroom.

of Peter for the encumbrances they must include the personal property. He also testifies that Peter sold the personal property to them, and that he sold it to them the same night they bought the farm, and at the same time, and that Peter put his own price upon it. It seems, therefore, that Pittenger did take some part in making the agreement, although Jane swears that he did not.

Again, Jane's testimony on the subject of Peter's subsequent expression of dissatisfaction with the conveyance, is by no means satisfactory. Peter had sworn that he had spoken to his sisters immediately after the conveyance, expressing his dissatisfaction, because he had received nothing for it, and had testified that he then told Jane that "he would not stand it." In reply, she testified as follows: "Peter never made any complaint to me or to my sister, to my knowledge, about being dissatisfied about the deed; he wasn't dissatisfied about the deed; it was about other things, nothing in particular; he was dissatisfied with everything; he said I had not done as I ought to; I don't know that there was anything said about my not having paid enough for his interest in the land."

Most significant upon the question of *bona fides* is the action of the parties to the transaction under consideration in reference to the judgment in favor of the administrators. By the deed the grantees assumed payment of it as part of the consideration, and yet, under it, Peter's interest in all the personal property on the farm was sold and bought in for the sisters. If the amount due on that judgment constituted so much of the purchase-money, what right had they to sell his interest in the personal property? He swears that he did not agree to transfer his interest in the personal property, but Pittenger swears that he did, and that he put his own price upon it; what price he put upon it, however, they do not say; nor is there any evidence that he did agree to transfer it. Pittenger says the amount of the judgment was apportioned, part on Peter's interest in the farm, and part on his interest in the personal property,

Randall v. Vroom.

but he says he cannot say what the apportionment was. The deed, however, declares that the grantees assumed payment of the amount due on the judgment as part of the purchase-money of Peter's interest in the farm.

Again, the administrators, in assigning the judgment to Jane and Martha, took their note for the sum of \$1,110.84, with interest and costs, and Pittenger swears that there were then \$1,110 and more due on the judgment to the administrators, the plaintiffs therein, but in the assignment he and his co-administrator declared that there was due on it the sum of \$563.49, and that sum was, according to the assignment, the consideration thereof. When Pittenger was asked why he took a note for the full amount of the judgment, when, in the assignment, the amount due on the judgment was stated at \$563.49, he declared his inability to explain it. In the deed, the amount due on the judgment is stated at another sum, \$768.52.

It appears to me to be clear, from the evidence, that the conveyance by Peter to his sisters, of his interest in the farm, was not made in pursuance of a *bona fide* purchase, but was made with the understanding between him and them that the property would, by that means, be protected for his benefit from the complainants' claim against him. Whether a conveyance be fraudulent or not, as against creditors, depends on whether it was made on good consideration and *bona fide*. It is not enough that it be on good consideration or *bona fide*; it must be both. If it be defective in either particular, though good between the parties and their representatives, it is void as to creditors. 1 *Story's Eq. Jur.* § 353; *Sayre v. Fredericks*, 1 *C. E. Gr.* 205.

The complainants are entitled to relief

Van Arsdalen v. Van Arsdalen.

ELIZABETH VAN ARSDALEN

v.

PAUL VAN ARSDALEN.

A husband excluded his wife from their bed-room, and imputed to her physical malformation and consequent incapacity for the marital relation. He removed to another house, to which he denied her admittance, on the ground of such alleged incompetency, notwithstanding her expressed willingness to return to him and do her duty. —*Held*, that she was entitled to relief on her bill for maintenance.

Bill for maintenance. On final hearing on pleadings and proofs.

Mr. A. V. Schenck, for complainant.

Mr. E. W. Strong, for defendant.

THE CHANCELLOR.

The parties are husband and wife. They reside in Middlesex county, and were married in December, 1876. The bill states that the defendant has, without just cause, abandoned the complainant, and separated himself from her and refused to maintain and provide for her. The answer denies the abandonment, and that the defendant has refused to maintain the complainant, and states that, on the contrary, she voluntarily left him to go and live with her relations, and that he has frequently, since she left him, requested her to return, and has, ever since she left him, been desirous, as he still is, that she should come back and live with him as his wife.

It appears from the testimony that, when the marriage took place, the complainant was about thirty-five years of age, and the defendant about eighty. She was his third wife. He was divorced, on his own application, from his second wife. On the 27th of March, 1877, soon after

Van Arsdalen v. Van Arsdalen.

their marriage, the parties went to live in a house owned by the defendant, in Codwise avenue, in New Brunswick. They lived there together until the 12th of June following, when he removed to another house of his, in Hale street, in that city. His design in removing appears to have been to take his meals in the family of Charles Thompson, the husband of a granddaughter of his, who lived in another of his houses in Hale street, immediately opposite the one into which he moved, and to lodge in the latter house. He did not intend to occupy the whole of the latter house, but only two rooms—a bed-room for himself, and one for his wife. Such were the relations of him and his wife towards each other at that time, that they not only occupied separate sleeping apartments, but he refused to eat food which had been cooked by her, and habitually cooked his own victuals. About the 5th of May, while they were living in the house in Codwise avenue, he threw her clothes out of the bed-room which he and she had occupied together up to that time, and locked the door, and kept the key, so as to exclude her from the room. Soon afterwards he apologized to her for his conduct, and obtained her forgiveness. She returned to his room, but two days afterwards he again locked her out of it, and never permitted her to return to it again so long as they lived in the house, which, as before stated, was up to the 12th of June following. He forbade her to cook for him, alleging, as his reason, that he was afraid that she would poison him. He charged her with having attempted to poison him, and declared that on one occasion she put some poisonous substance, which he believed was arsenic, into his coffee, and that after drinking it he was taken sick from the effect of the poison, and saved himself from death by the use of an antidote which he had previously obtained at a drug store and kept in the house because of his apprehensions that she would attempt his life by means of poison. He said he did not want her in his room, because she was physically unfit, by reason of malformation, for connubial intercourse. He told her she was

Van Arsdalen v. Van Arsdalen.

no woman, and he, therefore, did not want her. The last week of their residence in the house in Codwise avenue, he did not provide her with necessary food, and her sister Mary supplied it. While they lived there he did not furnish her with sufficient clothing. When he had nearly finished moving his furniture to the house in Hale street, he said to her: "Now, if you are a mind to go along with me, and go peaceably, you can go." To which she replied that she would go with him.

The next day, when she was about to remove her furniture to the Hale street house, he told her she had better go and live with her father on his farm. She answered that she would go if he would support her there, and he said that he would not, that he would not support her anywhere except under his own roof. She refused to go to Thompson's for her meals, and went to her father's house, (her father then lived a short distance from the Hale street house, in the same street,) and took her meals and slept at her father's house, but spent the days at the Hale street house, where her furniture was. The defendant kept all the house locked up except the two bed-rooms. On the 20th of June her father went, with Peter Gordon, to the Hale street house, to get some furniture which was there belonging to her sister. The defendant was, when they arrived there, in the garden of Thompson's house, immediately opposite. He came over to them and said: "What are you stealing now?" They told him what their errand was. The complainant was present. Her father, at that time, said to him that he and his wife had better live together as they ought to do. She expressed her willingness to do her whole duty in every respect as a wife. The defendant asked if she would sleep with him, to which Gordon replied that she said she would do her whole duty as a wife. The defendant then said that he would not have her back; that she was not a woman. He said "it" was not a woman, and he did not want her, and he thereupon,

Van Arsdalen v. Van Arsdalen.

with utter disregard of decency, made disgusting statements in regard to her.

On that occasion, after he had refused to receive her again, she said to him, when she left him, that she was going home (to her father's house) to stay a few days, and if he would treat her well she was ready to come back to him at any time. Her father testifies that in that interview he told the defendant that now Elizabeth (the complainant) had come back to keep his house and do the best she could for him; that the defendant said he did not want her; that he then asked him why not, and he answered that she was an hermaphrodite, and said he would not have her. Her father further says that she then said to the defendant that she had now come back to do her duty as a wife ought to, if he would accept her, and that he replied that he would not. The complainant swears that on that occasion she told him she was willing to come and do her duty, her whole duty as a wife, provided he would support and clothe her, and that he said that she was no woman, and if she was not he did not want her, and that she was not. She says that her father said to him: "You don't want her, eh?" to which he replied: "No; she is no woman, and I don't want her," and added the derogatory remarks before referred to.

It is true the defendant and Charles Thompson swear that the defendant did not refuse to take the complainant back, but said that his door was open to her at any time when she would cook for him, and that she said she would not cook for him; but the weight of testimony is with the complainant. Both Thompson and the defendant say that the latter did then allege that his wife was not a "fair woman." There is corroboration of the complainant's witnesses in the defendant's statements made to his acquaintances on the subject of his relations to his wife, and the cause of their separation. In none of them did he attribute the separation to her unwillingness to do her duty in any respect to him, but in all of them he stated that it was on account of his unwillingness to live with her because of the physical unfit-

Van Arsdalen v. Van Arsdalen.

ness before mentioned. To Archibald M. Gordon he said, in August, 1877, (the bill was filed July 28th, 1877,) that the reason why he moved from the Codwise avenue house was to get rid of her; and when Mr. Gordon expressed a hope that they would live together again, he replied, "No, I will never have her back again." In or about September, 1877, he told George W. Furman, an acquaintance of his, who called on him at the Hale street house on business, that his wife was not a woman, and with disgusting particularity described the physical defects which he imputed to her, and at the same time ascribed to her inordinate venereal appetite. He then said that he would have a "bill of divorce from her in two weeks' time, anyhow, in spite of her." To his own daughter, the complainant's step-mother, he said, that his wife was not a woman, and that he believed he could readily get a divorce from her on that account. In September, 1877, he admitted to William Kent that he had said his wife was no woman. In August, 1877, he said to Abraham D. Van Pelt that she was no woman, referring to and describing her alleged physical defect, and that he intended to get rid of her, and was going to New York (he was then on his way to that city) to see if his "bill of divorce" was ready. To Mr. Van Pelt's question whether he could "get a divorce in New York that way," he replied, "Yes, I got one before." As before stated, he was divorced from his second wife. Though the defendant denies he stated to any one after the commencement of this suit that his wife was not a woman, the evidence against him is overwhelming.

The complainant testifies that the physical defects imputed to her have never existed, and there is no evidence to the contrary except the defendant's statement. Though he and Thompson say that he was desirous, when she spoke of returning to him, that she should pledge herself to cook for him if he permitted her to return, it seems difficult to reconcile this with the admitted fact that he charged and believed that she twice attempted to poison him, and in consequence

Van Arsdalen v. Van Arsdalen.

of his apprehensions on that score refused to eat food prepared by her. In his cross-examination, to the question, "Do you now, on your oath, say that you suspect your wife of having administered, or having attempted to administer, or of having been concerned in any way in any attempt to administer poison to you, in any manner, at any time?" he replied, "I say more than once." And to the question, "Do you mean now to be understood as saying that you suspect your wife of having attempted to poison you by means of the coffee, to which you have referred?" he answered, "I said I expected that she meant to poison me, or that her sisters did; they are all a set of hell-hounds." It seems improbable that, with these convictions upon his mind, he would have even desired, much less have insisted, that his wife should pledge herself to cook for him.

It is claimed in his behalf, as evidence of his disposition to deal liberally in pecuniary matters with her, that he conveyed to her part of his property; but it appears that the deed was made within a few days after their marriage, and conveyed an estate for his and her joint lives, (the rents, issues and profits to be taken by him alone, however,) with remainder to the survivor. And referring to this property he said to Mr. Van Pelt, in the conversation before referred to, that it was subject to a mortgage to Mr. Ogilby, and that he could have it foreclosed by not paying the interest promptly, and could have some friend buy the property in for him; thus indicating his purpose to deprive the complainant of her interest in it.

It is very evident that the married life of these parties while they lived together in the Codwise avenue house was unhappy, by reason, it would seem, to a very great extent, of the defendant's parsimoniousness, his suspicious disposition, and his coarse, vituperative and provoking language towards his wife; while she, on the other hand, gave evidence of a high and at least somewhat resentful temper. He appears to have conceived a dislike to her three sisters, on the ground that they lived upon him; and to one person,

Van Arsdalen v. Van Arsdalen.

and perhaps more, he complained of it, but there seems to have been no ground for the complaint. As to two of them, they were at his house to stay only a few days at most, and were there to do the work of his household during the temporary disability of his wife. He kept no servant. As to the other, it was agreed between him and his wife that she, her youngest sister, whom her mother at her death had consigned to her especial charge, should live with them (up to the time of the marriage she had been living with the complainant), and it appears that when the defendant complained of her presence in his house she left it.

But whatever may have been the scenes and contentions and the cause of them before the defendant left the Codwise avenue house, it is proved that, on the 20th of June, 1877, the occasion before referred to, the complainant went to him and asked him to take her back into his house and support her, she then promising to do her whole duty as a wife towards him; and he then positively denied her request, and refused to receive her, alleging that, by reason of her physical defects and her consequent incapacity for matrimony, he did not want her and would not have her. From that time he must be regarded as having abandoned her and refused to provide support for her. It is true he says in his answer that he often requested her to return, and in his testimony he says he told her solicitor that he was desirous that she should return to him; but it does not appear that he ever told her so or sent her even any invitational message, although she was living within a few doors from him, and in the family of his own daughter. On the contrary, it appears that in September, 1877, two months after this suit was brought, he of his own accord sent part of her clothes from the Hale street house to her at his daughter's house, and soon after, without any request from her, took all the rest there himself.

The complainant is entitled to the relief which she seeks.

Trustees for Support of Public Schools *v.* Anderson.

THE TRUSTEES FOR THE SUPPORT OF PUBLIC SCHOOLS

v.

JOHN ANDERSON and others.

A release of a grantee's assumption of a mortgage debt, given by an insolvent grantor after notice of foreclosure, without consideration and for the sole and admitted purpose of defeating the mortgagee's claim in equity for deficiency, is void in equity.

Bill to foreclose. On final hearing on pleadings and proofs.

Attorney-General John P. Stockton, for complainants.

Mr. C. M. Woodruff and *Mr. L. Cochran*, for answering defendants.

THE CHANCELLOR.

The question presented for consideration is, whether the release by a grantor of a covenant made in his favor by his grantee stipulating to pay a mortgage given by the former on the land, and to which, but for the release, the mortgagee would, in equity, be entitled to have recourse for the payment of the mortgage debt, is effectual against the mortgagee where the release is merely voluntary, and confessedly made for the mere purpose of depriving the mortgagee of such recourse.

In the case in hand the defendant John Anderson, on the 12th of August, 1871, gave to the complainants, The Trustees for the Support of Public Schools, a mortgage for nine thousand dollars, payable in one year from the date of

NOTE.—Under what circumstances a release of an assumption of a mortgage, made by the grantor to his immediate grantee, may be valid as against the mortgagee, see *Stephens v. Casbacker*, 8 Hun 116; also, *Hartley v. Harrison*, 24 N.Y. 170.—REP.

Trustees for Support of Public Schools v. Anderson.

the mortgage, with interest payable semi-annually, on about one hundred and eighty-three acres of land in Sussex county. On the 26th of August, 1871, a few days after the date of the mortgage, the mortgagor conveyed the mortgaged premises to Benjamin Anderson, Jr., for the consideration, as expressed in the deed, of ten thousand dollars, the grantee expressly assuming the payment of the mortgage.

On the 1st of April, 1873, Benjamin Anderson, Jr., conveyed the property (the mortgage debt was then past due) to Hiram Ackerson, for the consideration of eleven thousand dollars. The deed contained the statement that it was well understood by the parties thereto that the property was subject to the encumbrance of two mortgages, one of which was the complainant's, and the other a subsequent one, and that the grantee thereby assumed to pay them as part of the purchase-money. Ackerson, by deed dated February 9th, 1874, conveyed the property to Michael Youngs, for the consideration of nine thousand eight hundred and ninety-one dollars and eighteen cents. The deed contained a like assumption on the part of the grantee as to the complainants' mortgage. On the 16th of March, 1875, Youngs conveyed the farm to Benjamin A. Anderson, for the consideration of ten thousand five hundred and twenty-one dollars and twenty-five cents, the grantee assuming the payment of the mortgage of the complainants. In February, 1874, the state treasurer duly notified Youngs, then the owner of the property, and the mortgage being past due, that a payment of two thousand dollars of the principal, on or before the 1st of April then next, was demanded by the complainants. In March, 1875 (the demand not having been complied with), another was, by due authority, made on Youngs (he, however, was not then the owner of the property), for payment of two thousand dollars, on account of principal, on or before the 1st of May then next. This demand, also, was not complied with. The interest was paid up to February 12th, 1876. On the

Trustees for Support of Public Schools v. Anderson.

24th of April, 1877, the attorney-general wrote to Youngs that the mortgage had been placed in his hands, with positive orders to proceed to collect it, and requesting him to pay the money.

The search of the records of Sussex county necessary to be made, with a view to the foreclosure proceedings, was made by the clerk of that county, on the requisition of the attorney-general, and was completed on the 2d day of May, 1877, and the bill was filed on the 22d of that month. On the 5th of that month, after the search had been made, and before the filing of the bill, the mortgagor and Benjamin Anderson, Jr., Horace Ackerson and Michael Youngs executed releases of that date—the mortgagor to Benjamin Anderson, Jr., the latter to Ackerson, and he to Youngs—of their respective assumptions of the complainants' mortgage in the deeds to them respectively. The releases were for a nominal consideration, and were executed merely for the purpose of preventing the complainants from having recourse in equity to Youngs for the payment of the mortgage debt. The mortgagor was and is entirely insolvent, while Youngs is, as he admits, pecuniarily responsible. The defendants, Benjamin Anderson, Jr., Hiram Ackerson and Michael Youngs, have answered, denying their liability to pay deficiency.

That the releases were executed and delivered merely in view of this suit, and for the purpose of preventing the complainants from having recourse in equity to Youngs, is proved, and, indeed, is admitted. That the grantor may, before suit brought against his grantee by the mortgagee to obtain the benefit of such a covenant of assumption, release or discharge it, and so prevent the mortgagee from obtaining any benefit of it, is established. *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 650. But the act of release or discharge, to be effectual, must be done *bona fide*, and not merely for the purpose of thwarting the mortgagee and depriving him of an equity to which he is entitled. Where a person, in consideration of a debt due from him, agrees

Trustees for Support of Public Schools v. Anderson.

with his creditor that he will, in discharge of it, pay the amount to the creditor of the latter, in discharge or on account of a debt due from the latter to him, though the agreement may be *bona fide* rescinded by the parties to it for considerations or reasons satisfactory to themselves, and without account or liability to the creditor who is not a party to it, yet, if the promisee be insolvent, and the rescission be merely a forgiving of the debt for the mere purpose of defrauding the creditor of the promisee, or protecting the promiser against his liability, the rescission will not avail in equity.

In the present case, recourse was had to the expedient of the releases, as a means of protecting Youngs against his liability to the complainants, who, though they had not, in fact, commenced suit, were, as the parties to the releases well knew, about to do so; and they had made preparations accordingly. No consideration passed, nor was any to be given. Nor were the releases founded on any equity or equitable consideration. The mortgagor was insolvent, and had no longer any interest in the indemnity which Youngs had given him against his liability on the complainants' mortgage. Had he been solvent, the releases would, of course, not have been executed. The hollow, unsubstantial formality of the execution and delivery of the releases creates no barrier to the equitable relief to which the complainants are entitled.

A release executed *mala fide*, for the mere purpose of defeating the action of equity, or of eluding its reach, will be of no avail. It is conceded that it would have been too late to discharge or affect the equity under consideration as against the mortgagees *in invitum*, by agreement between the mortgagor and his grantee after suit had been actually commenced, and this case is within that principle. The attorney-general notified Youngs, by letter dated April 24th, 1877, addressed to him at Newton, of his intention to bring suit to collect the mortgage debt. Youngs lived at Andover, a few miles distant from that place. The letter

Shaddle v. Disborough.

appears to have been forwarded to him at Andover, from Newton, on the 1st of May following. The releases were executed four days afterwards.

There will be a personal decree for deficiency against the answering defendants.

CORNELIUS SHADDLE

v.

HENRY DISBOROUGH.

A person agreed to exchange his farm for city lots, but made no effort to ascertain their value, and there was no misrepresentation by their owner. On a bill for specific performance, he set up as a defence that they were worth less than he supposed. Their value not being so inadequate as to be evidence of fraud,—*Held*, that the defence could not prevail.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. R. V. Lindabury, for complainant.

Mr. H. M. Gaston, for defendant.

THE CHANCELLOR.

The bill is filed for the purpose of compelling specific performance by the defendant of an agreement in writing made between the parties on the 12th of June, 1877, by which the defendant agreed with the complainant to convey to him in fee-simple, by deed of warranty, with full covenants, free from all encumbrances except a mortgage of \$1,000, on or before the 25th of June then next ensuing, his farm of about one hundred acres in Somerset county, for the consideration of \$8,000. In satisfaction of that price he was to accept

Shaddle v. Disborough.

from the complainant two lots of land on Lexington avenue, in Jersey City, each twenty-five feet front by one hundred feet in depth, being lots Nos. 58 and 60 on the Jersey City map. On one of those lots were a dwelling-house and barn and other improvements. The property was, according to the agreement, valued at \$4,500, and was to be taken subject to a mortgage of \$2,000 thereon, but all interest on the mortgage and taxes on the property were to be paid up to the time of transfer. The complainant was also to pay him \$500 in cash on or before the passing of the title, to give his bond, to be secured by mortgage on the farm, for \$4,000 with interest, and to pay off the \$1,000 mortgage which was on the farm, on the 1st of April, 1878. The agreement, as drawn and signed by the defendant, provided that the father of the complainant should be surety on the bond for \$4,000. That provision was inserted without the complainant's authority, consent or knowledge, by the agent who negotiated the exchange, and who drew the agreement. The complainant, when the agreement was presented to him for signature by the agent, refused to sign it unless that provision was erased, and the agent claiming to have authority from the defendant to erase it, did so accordingly. The time fixed in the agreement for paying the money and exchanging the papers, was June 25th, 1877, between the hours of nine o'clock in the forenoon and six o'clock in the evening, and the place was the agent's office in Somerville. The complainant attended there at nine o'clock in the forenoon of that day, prepared to perform his part of the agreement so far as it was to be performed on that day. The defendant came there, but would not say whether he intended to perform the agreement or not. He left the office, saying that he would soon return and would then be ready to talk to the complainant. In about an hour he returned and said he was not yet ready to give the complainant an answer, but was having the matter looked into, or something to that effect. He went away again, but did not return. His attorney came about three o'clock in the

Shaddle v. Disborough.

afternoon, and said he was there on the defendant's behalf, and that the latter would not return. The complainant then tendered the sum of \$500 to the attorney, with a deed conveying the Jersey City property to the defendant, and a bond and mortgage on the farm, in favor of the defendant, for \$1,000 and interest, and at the same time exhibited receipts for the taxes on the Jersey City property, and demanded a deed for the farm. The attorney took the papers and examined them and returned them to the complainant, finding no fault with them except that there was no receipt for a water rent of \$12; that the complainant, explaining that it was only through inadvertence that it was not then in his possession, offered to obtain at once if the attorney desired it. The attorney thereupon made no further objection on that score, but drawing from his pocket an abstract of the title of the Jersey City property which had been lent to the defendant by the complainant when the contract was signed, to aid him in investigating the title to the property, said there were some things in it which he did not understand, and he then invited the complainant to accompany him to his office that he might make some investigation there in regard to it. The complainant went with him accordingly, and, while there, again made the tender, whereupon the attorney said he did not think the title was quite right, to which the complainant replied that it was correct, and asked him if he, as the defendant's representative, declined to perform the agreement. To this the attorney replied that there was one water rent receipt missing. The complainant thereupon offered him \$50, to be held as security that he would obtain that receipt. The attorney declined to take the money, and then said that a Mr. Mooney, a land agent, said the Jersey City property was not worth more than \$2,500, and the attorney added that the defendant would not make the exchange at all. The next day the complainant obtained the missing receipt, and two days thereafter showed it to the defendant and his attorney, and, offering to specifically perform the contract, requested

Shaddle v. Disborough.

the defendant to do so, but the latter refused, saying that the Jersey City property was not worth \$4,500, and that his attorney then had the matter in charge and it "would have to go through."

The defendant, by his answer, sets up, by way of defence, the alteration of the agreement by striking out the clause therein providing that the complainant's father should be surety on the bond for \$4,000; that the complainant induced him to enter into the agreement by falsely representing to him that the Jersey City property cost him \$4,500, and that his equity of redemption therein was worth \$2,500, and that he, the complainant, could get \$30 a month rent for the property; whereas, the defendant had, since the signing of the agreement, discovered that \$20 a month was the full rent that could be reasonably obtained for it; that the complainant suppressed the fact that the water tax of from \$12 to \$18 a year was to be paid out of the rents, and was a lien on the property; that after paying interest on the mortgage on the property, and the taxes, there would remain but little, if anything, to the owner, out of the rents after paying for necessary repairs; and that the income is uncertain, depending on the obtaining of a tenant for the property; that the bargain is a hard and unconscionable one, and ought not to be enforced; and that the agent of the parties, on or about the day on which the contract was signed, told the defendant that the complainant was then painting and making repairs on the property, as he had been informed by the complainant, to the amount of from \$200 to \$225, whereas no considerable repairs were then, nor have any since, been made on the property.

The conduct of the complainant in the entire transaction which is the subject of investigation in this suit, appears to have been entirely fair, frank and upright. He does not even appear to have been eager to make the exchange. He did not seek out the defendant. The agent, Van Doren, in whose hands the defendant had placed his property for sale, brought it to the notice of the complainant. The com-

Shaddle v. Disborough.

plainant, at first, proposed that the defendant should go and examine his property, as a preliminary to any negotiation. The defendant did so, and says that he "was not at all pleased with the property; that it was very uninviting, in a miserable condition, and looked as if it had a very hard tenant in it." When asked why he did not then make a longer examination of it, he says: "I saw enough to satisfy me, and I rather came to the conclusion that I would not be very apt to trade for it." The complainant says the defendant examined the ground, asked the size of the lots, went into the stable, and into one room of the house, and that when he came out the complainant asked him if he had not better examine the property all through, to which he replied, no, he had seen enough; that the defendant then asked him about the rent the property would bring, and that he told him that it rented in the spring of 1874 for \$35 a month; that in the spring of 1875, his agent, Mr. Garra-brant, had let it at \$37.50 a month; that that tenant had left the house on account of ill health; that he had been ordered to leave Jersey City because the air there was too strong for him, and that Garrabrant had put in the tenant who was then in at \$20 a month. The complainant says that the defendant then said to him: "Now that I have come down and have seen your property, I would like you to come and see my farm, and we will see what we can do." The complainant, subsequently, in accordance with this invitation, went, with his wife, to Somerville, to look at the defendant's farm. He says that, after examining it, he said to the defendant: "Now that you have seen my property, if you are willing to take it in exchange at \$4,500 I will give you \$7,500 in this way: my property, subject to a mortgage of \$2,000 on it, and a bond and mortgage on the farm for \$5,000, and \$500 cash." He says that the defendant said he thought that was not enough, and then asked him what were the expenses of the complainant's property, what were the taxes, &c.; that he then told him that the city taxes were fifty-odd dollars a year; that there were

Shaddle v. Disborough.

water taxes of from \$12 to \$18 a year, and that he paid an agent five per cent. for collecting the rent; that the defendant still insisted that the complainant did not offer him enough, and the latter, after consulting with his wife on the subject, advanced his offer to \$8,000. The defendant thought that the amount was not sufficient, but the complainant declined to give more, and left him, saying that he might consider the matter, and if he desired to trade on the basis of that amount, he might inform him through Van Doren, the agent. The agent subsequently told the complainant that the defendant wished to see him again on the subject, and the complainant again went to see the defendant, at Somerville, where the latter was then living. The defendant again spoke of the rents of the Jersey City property, and the complainant then told him that he had notified his agent, Garrabrant, to dispossess the tenant, and the defendant then said that he thought that if he could get \$300 a year for the Jersey City property he thought he would be satisfied. He still insisted on a higher price than \$8,000 for his property, and the complainant offered him \$8,250, of which \$250 were to be paid in cash, the defendant was to take the Jersey City property subject to \$2,000 mortgage for \$2,500 more, and the complainant was to give a mortgage on the farm for \$5,500. The defendant did not then agree to accept this price, because he thought it was not enough, but expressed his desire that the complainant, who intended to live on the farm if he obtained it, should have it rather than any speculator, and stated a condition relative to the possession by his son of the farm for the season in case he should make the exchange. No agreement was then made. This last interview was in the latter part of February, 1877.

On or about the 19th of March following, the complainant was informed, by letter from Van Doren, that the defendant, through Mooney, the land agent before mentioned, had agreed to exchange his property for the equity of redemption of two houses and lots in Irvington, and a mortgage of \$6,000 on his farm. From that time until the

Shaddle v. Disborough.

following May or June the complainant heard nothing more on the subject. Then, Van Doren, at the defendant's request, wrote to him that the proposed exchange for Irvington property had not been carried out, and that the defendant would like to have the complainant take the farm if he would give \$500 more. The complainant then wrote to the agent (and the letter was shown by him to the defendant) that he would remember that he had said, when he left him in Somerville, on the occasion of the last interview on the subject of exchange, that he would never do so well again, but added that he would exchange on the basis which he had mentioned when in the defendant's farm-house, \$8,000 for the farm, the Jersey City property to be taken at \$4,500. Van Doren communicated this to the defendant, who then remarked that it was \$250 less than the complainant had offered before, and said he could not do it, but that he would take \$500, and not go and see the Jersey City property again. Van Doren, on the 4th of June, 1877, communicated this, by letter, to the complainant, who replied, declining to give more than \$8,000, and, according to Van Doren's recollection, told the latter to tell the defendant to go and look at, and find out all about the Jersey City property. Van Doren informed the defendant of this answer, and the latter then told him he meant to make the exchange, but that Van Doren must not tell the complainant, but must try to get \$500 more out of him if he could. Van Doren made an effort to that end, but was unsuccessful, and so informed the defendant, who then agreed to make the exchange. Van Doren drew the contract, and inserted in it the provision that the complainant's father should be surety on the bond to be given by the complainant. This was done merely in consequence of a remark made to Van Doren by the complainant's father, without the knowledge or procurement of the complainant, that if the defendant desired it, he would be surety on the bond to secure prompt payment of interest. His reason for making this offer was his desire that the complainant, who was engaged in commercial

Shaddle v. Disborough.

business, should buy a farm for a home. When this provision was written in the agreement, Van Doren expressed a doubt whether the complainant, who knew nothing of that matter, would consent to it, to which the defendant replied, that he did not ask it, and that Van Doren could either put it in or leave it out; that the farm was sufficient security. Van Doren took the contract to the complainant on the same day. The latter, on reading it, refused, as before stated, to sign it, because of the provision just referred to, saying that he never allowed anybody to go on his paper. Van Doren then replied: "All right. Mr. Disborough consented that I should scratch that out." The complainant then queried whether to erase it would not invalidate the agreement, to which Van Doren replied, that it would not, seeing that the defendant had consented that the provision be expunged if the complainant desired it. The sentence was then erased, and the complainant signed the agreement. The next morning Van Doren saw the defendant, and informed him that he had erased the provision in regard to surety on the bond, to which the defendant replied, expressing his assent, and adding that he had not asked for security.

Though the answer sets up this alteration as a defence, it is very clear that the defendant consented to it. He, in fact, had never asked for a surety, nor had it been suggested by the complainant, or on his behalf, nor by the defendant. Van Doren inserted the provision without authority, and the defendant knew it. When the former expressed a doubt whether the complainant would be willing to let the provision stand, the defendant at once consented that it be expunged if the complainant should desire it. And the next morning, after the agreement had been signed, when he was informed that the provision had been struck out, he expressed his assent. To the complainant's solicitor, who called on him, at the complainant's request, to ascertain his reason for saying that he would not perform the agreement, he said he did not refuse to comply on account of the alteration, and admitted that the alteration was made with his

Shaddle v. Disborough.

consent, and added that he cared nothing about it, but had other grounds of refusal. And finally, when, on the day when the papers were, according to the agreement, to be exchanged, he referred to the alteration, the complainant asked him if he refused to comply on that ground, he replied that he did not. That defence is wholly untenable.

The misrepresentations set up in the answer are, that the equity of redemption in the Jersey City property was worth \$2,500, whereas, in fact, it was not worth more than \$500; that that property cost the complainant \$4,500, whereas he obtained it by exchanging for it other real estate, and paying some money, in 1873; and that, though its price in the exchange was nominally \$4,500, it was, to a great extent, fictitious; that the complainant could get \$30 a month rent for it, whereas \$20 a month is a full rent for it, and that he suppressed the fact that the water tax was to be paid out of the rent.

As to the first of these alleged misrepresentations: It does not appear that the complainant ever stated to the defendant that the equity of redemption was worth \$2,500. What he said was, that the property had cost him \$4,500, and was mortgaged for \$2,000. He proves by James L. Robertson, of whom he got the property, that Robertson sold it to him for \$4,500. Robertson swears that he considered it the same as a cash sale; that, though he was paid by exchange of property for it, he would not have taken less than \$4,500 in cash; that he bought it in 1870, and paid \$4,000 for it; that the person of whom he bought it occupied it as her residence; that he himself resided there so long as he owned it, and spent from \$500 to \$800 in improvements on the property to fit it for his own use after he became the owner of it, and that he asked \$5,000 for it for some time. He resides in Jersey City, and says that the property is now worth, in his opinion, from \$4,500 to \$5,000.

The defendant does not, in his testimony, say that the complainant represented to him that the equity of redemption was worth \$2,500, or any other sum, but says that the

Shaddle v. Disborough.

latter put in his property at \$4,500. Though he says that when on the renewal of the negotiations, after he had failed to make the exchange for the Irvington property, Van Doren handed to him and permitted him to keep the complainant's letter before referred to, in which the complainant proposed that Van Doren and the defendant should go to Jersey City and see the complainant's property, he told Van Doren that he did not think that was necessary, that, if he traded with the complainant, he would so at the latter's valuation of the property, Van Doren swears that he did not say so, but told him to try to get the complainant to give more than he then said he was willing to give for the farm. Nor is it probable that he did say so; for it appears that it was at his own instance that negotiations with the complainant were resumed. He admits that he told Van Doren at that time that he would like to deal with the complainant. There is nothing in the case to corroborate him in the statement that he said to Van Doren that he proposed to rely on the statement of the complainant as to valuation. The complainant does not appear to have been anxious to make the exchange. The defendant had seen the Jersey City property, and though, according to his testimony, he was not satisfied with it, he does not appear to have ever said so to the complainant or to Van Doren. The complainant appears to have insisted that the defendant should come to a conclusion for himself, on examination and inquiry as to the Jersey City property, and seems to have refrained from making any representation on the subject of value. He said that the property had cost him \$4,500, and in the agreement the property is said to be "valued at" that sum. The defendant testifies that the complainant never asked him to accept or rely upon his estimate of the value of the property. There can be no doubt, that had the defendant told the complainant, or given him to understand that he intended to deal with him on the assumption that the complainant represented the property to be worth \$4,500, the agreement for exchange would not have been made. It is enough to

Shaddle v. Disborough.

say that there is no proof that the complainant made the alleged representation.

The defendant's account, in his testimony, of his discovery that the Jersey City property was not of the value which he says the complainant represented it to be, is at variance with the statement of his answer on that head. In his testimony he says that the next day after the contract was signed, Mooney, who was then on his way, with his wife and child, to Lamington, called at his house, not on business, but as a friend, and said that, if convenient to the defendant, he would call again the next day, on his return. The next day he came with his wife and child, and stayed all night at the defendant's house. The defendant says that he then asked Mooney to go and see the Jersey City property and ascertain its value, and that on Monday following, the 18th of June, six days after the day on which the contract was signed, he received a letter from Mooney, saying that he had been on the preceding Saturday to see the property, and that, in his opinion, it was not worth the amount of the mortgage on it. He says that the next morning he went down to Van Doren's office and told him he wanted to see the agreement; that Van Doren said it was not there, but at his house, and promised to send it to him the following morning; that when it was brought to him the next morning, he found, to his surprise, that it had been altered by the erasure of the before-mentioned provision for security, and that a day or two afterwards he spoke to Van Doren on the subject of the alteration, and asked him what business he had to make it, and that Van Doren replied that the defendant had consented to it, which he then denied. In his answer, which is under oath, the defendant says that, a few days after the agreement was signed, he obtained a copy of it from Van Doren, and then first learned of the alteration; that that first excited surprise and alarm in his mind, and led him to send a competent agent to learn and report the value of the property. When asked in his testimony to account for the striking discrepancy in these statements, he admits his inability to do so. The difficulty increases when

Shaddle v. Disborough.

it is considered that it seems clear that he was apprised of the alteration on the next morning after it was made.

Van Doren swears that the defendant never told him that he did not mean to carry out the contract until the Saturday next preceding the Monday on which the papers were to be exchanged, according to the agreement; that he then said he was "sick," but said nothing about misrepresentation by the complainant, and that he said that he would pay something to be released, but did not name the sum. Van Doren explicitly swears that the defendant did not, prior to the 25th of June, say anything about any misrepresentations of the property by anybody.

That the defendant had ample opportunity to examine the property and make inquiry in regard to it and its value, abundantly appears, and, indeed, is not denied. It is also clear that the complainant avoided making representations as to value, and insisted that the defendant should satisfy himself on that point. So far from preventing or forestalling inquiry, the complainant urged the defendant to make it. Under such circumstances the latter has no just cause of complaint, if the property proves to be less valuable than he supposed; for if he suffers loss it is the consequence, not of the complainant's representations, but of his own disregard of the dictates of common prudence, against which he has no more right to expect that this court will protect him than he would have to expect that it would relieve him from a contract for the sale of his corn at half the market price, merely because when he sold it he did not know and would not take the trouble to inquire what the market price was. *Mason v. Gosby*, 1 Woodb. & M. 342; *Warner v. Daniels*, *Id.* 90; *Hough v. Richardson*, 3 Story 659.

Nor were the complainant's representations as to the rent of the property false, or in any way fraudulent. The defendant, indeed, swears that the complainant told him, when he went to see the Jersey City property, that he had rented it the then last spring (1876), for \$40 a month, and had a very good tenant, referring to the invalid before mentioned; and

Shaddle v. Disborough.

his son testifies that the complainant told his father, at the farm, that the rent was \$40 a month; but, on the other hand, the complainant positively denies having said that he had received \$40 a month rent, and he is corroborated by Van Doren. They say he said it was \$37½. There is no evidence that he did not receive that amount of rent as and when he said he did. It is important, in this connection, to turn to the answer. It does not allege that the complainant represented that he received \$40 a month rent, nor even \$37½, but \$30. In the letter of June 2d, 1877, which is produced from the custody of the defendant, the complainant says that his property is rented for the then coming year at \$20 a month, and he adds that he could have got \$30 if he could have got the tenant out, but that the latter gave him trouble, and it was the 1st of June before he could let the house. The agent who has the property in charge, letting it and collecting the rents, says that, in his opinion, it ought to rent for \$400 a year, or \$33.33 a month. The complainant swears that the defendant told him, in the latter's house, that if he could be assured that the property would rent for \$300 a year he would be satisfied; that he then told him that it had been rented for \$35 a month, and had been rented for more, and he had no doubt it could be again rented for that sum, and said that the amount for which it was then rented, \$20 a month, was less than that for which it had been rented. It is proved that \$30 a month (the rent mentioned in the answer) is a reasonable if not a low rent for the property, and it is not proved that any representation made by the complainant in reference to the rent was untrue.

It is very significant, as to all these alleged misrepresentations, that the defendant did not, when called upon to perform the contract, present them as an excuse for his refusal rather than queries in regard to the title of the property. It is evident that his hope of escape from the obligation of the agreement was through objection to the title of the property, if any could be made, rather than through the defence of

Shaddle v. Disborough.

alleged misrepresentations. He says that when he left his house to go to Van Doren's office, on the day fixed for the exchange of the papers, he was undecided what to do, but before he got to Main street, he determined to show the abstract of title, which the complainant had lent to him several days before that time, to his lawyer, thinking, he says, that there might be some flaw in the title, and he might get out of it in that way. He further says that after giving the abstract to his lawyer for examination, he went to Van Doren's office and there found the complainant and his wife, the complainant's lawyer and (he thinks) Van Doren; that they asked him if he was ready, and he said no, that his lawyer was looking over the abstract of title; that he stayed there but a few minutes and went back to his lawyer's office; that he thinks he saw them again that day, but does not recollect anything in particular which occurred at the second interview; that they asked him how near he was to being ready, and he replied that his lawyer was examining the abstract. It is surprising that, if he then was aware, as he says he was, of the falsity of the alleged representations on which his defence is almost entirely based, he should not at least have mentioned some of them as an excuse rather than to have relied on objections to a title against which he neither knew nor had reason to suspect anything. Van Doren testifies that on that occasion, when the complainant asked the defendant if he refused to comply with the agreement because of the alterations, he replied, "No, I don't, but there are other things I don't like in the title," or "about the title." He says he did not say a word about having been deceived. Again, in the interview between his counsel and the complainant on that day, these alleged misrepresentations do not appear to have been mentioned.

The answer alleges that Van Doren, who it states was the broker for both parties, on or about the 12th of June (the day on which the agreement was signed) represented to the defendant that the complainant was then painting and making repairs on the Jersey City house, as the complain-

Shaddle v. Disborough.

ant had informed him, to the amount of from \$200 to \$225, and would so put the property in complete repair; whereas the defendant alleges that no repairs of consequence have been made.

It appears that the agreement was first signed by the defendant: that on the morning when it was drawn, Van Doren told the defendant that the complainant had ordered Mr. Isbills to put the house in thorough repair, and that it might cost \$100 or \$150, and he adds that he thinks he said Isbills was ordered to paint it. Though the statement does not appear to have been made as an inducement to the defendant to enter into the agreement, the complainant made the repairs and caused the painting to be done.

There is nothing in the case to sustain the allegation of misrepresentation in regard to the water tax.

But the answer insists that specific performance ought not to be decreed because the bargain sought to be enforced was hard and unconscionable. Inasmuch as no fraud is shown to exist in the case, this defence must rest on inadequacy of price alone. But unless the inadequacy is such as to shock the conscience of this court and in itself to amount to conclusive and decisive evidence of fraud in the transaction, a defence to such an action as this, based on that alone, will not avail. *Coles v. Trecothick*, 9 Ves. 234, 236; *Garrett v. Macon*, 2 Brock. 185, 246; *Fry on Spec. Perf.* § 281; *Rodman v. Zilley, Sax.* 321.

The proof, however, does not show inadequacy of price. Nine witnesses, all living in Jersey City and having knowledge of the value of property there, testify that the property is now worth between \$4,000 and \$5,000. It is true, there are ten witnesses produced on the other side who put a much lower valuation on it. Five of them, however, are persons who reside and do business in Rahway. It is hardly necessary to say that their opinions on the subject of the value of property in Jersey City, are, therefore, inferior in weight to those of persons residing in Jersey City and having knowledge of the real estate market there. One of those

Pasman v. Montague.

five witnesses is Nicholas Mooney, who appears to have taken an active interest in the suit in behalf of the defendant, and to have got the other four to go to Jersey City to examine the property with a view to testifying in this action, as to its value, on behalf of the defendant.

There will be a decree for specific performance.

JOHN L. PASMAN

v.

EBENEZER MONTAGUE.

A complainant alleged that he was induced to execute certain deeds, by the false representations of the defendants, and also through his own ignorance of the fact that the lands had been owned by his mother, and devised by her to him. The evidence utterly failed to substantiate the bill.—*Held*, that he could not be allowed to change his position and claim relief on the ground that, although he voluntarily executed the deeds to the defendants, he did so under a mistake as to the extent of his interest in the lands conveyed.

Bill for relief. On final hearing on pleadings and proofs.

Mr. F. McGee and *Mr. J. D. Bedle*, for complainant.

Mr. W. B. Williams, for defendant.

THE CHANCELLOR.

The complainant, by his bill, seeks relief against the consequences of fraud, which he alleges the defendant practiced upon him in reference to certain real estate, in what was formerly Hudson City (now Jersey City), in the county of Hudson, of which the complainant's mother, Catharine Pasman, died seized. She died on the 14th of March, 1852.

Pasman v. Montague.

She had obtained the title to the property from Montague (who was her son-in-law), by deed dated April 22d, 1842, by which he conveyed it to her for the consideration of \$5,500, subject to a mortgage of \$5,000 upon it; the amount of which was computed and allowed to her as so much of the consideration, and the payment of which she assumed. Montague became the owner of the property in August, 1840. According to the deed, as well as the other evidence in the cause, she gave but \$500 above the amount of the mortgage for the property. Montague swears that he himself paid off the mortgage after the conveyance to her was made. She, by her will, dated October 28th, 1850, gave half of her estate, real and personal, to her daughter, Amelia Ellen, wife of Montague, and the other half to the complainant, and appointed the complainant executor. The will was proved before the surrogate of Hudson county, on the 10th of April, 1852, about a month after her death. She conveyed away part of the property, about ten lots, in 1848 and 1850. After her death, and on the 8th of July, 1852, Montague and the complainant, with their wives, conveyed part of the property to Justus and Horace M. Smith, for the consideration of \$8,000. To secure the purchase-money and \$2,000 besides, lent to them by Montague to enable them to build on the property, the Smiths gave a mortgage on the premises to the complainant, of the same date as the deed. The complainant assigned the mortgage to Montague by assignment dated the 25th of July, 1852, and recorded on the 20th of October, 1855.

On the 25th of March, 1853, Montague and the complainant, with their wives, conveyed another part of the property to the mayor and common council of Jersey City, for the consideration of \$1,200, which was paid to and retained by Montague.

On the 8th of April, 1854, the complainant and his wife conveyed to Richard Morrell, William O. Davey, Isaac J. Vanderbeck and Benjamin Mills, the undivided half of another part (fifteen and one-fifth acres) of the property, for

Pasman v. Montague.

the consideration of \$19,000 as expressed in the deed. Montague and his wife conveyed to them the other half. The grantees gave a mortgage to the complainant and Montague, of the same date as the deed, for \$21,735 and interest, on account of the purchase-money.

On the 10th of April, 1854, two days after the date of the deed, Pasman assigned the mortgage to Montague for the consideration of \$10,687.50, as expressed in the assignment. The assignment was acknowledged on the 11th and recorded on the 12th day of the same month of April. By a sealed instrument of the same date with the deed, the grantees in the deed released the complainant from the covenants in the deed, except the covenant of warranty, as to which they declared that its only effect was to be the estoppel and bar created thereby, and to transfer any estate or title which he or his heirs or assigns might thereafter acquire, and transfer it to them or their heirs or assigns, and the complainant covenanted with them that a judgment of \$10,357.66, recovered by one Charles Hallock, in the supreme court of this state, in 1843, against Montague, but then held by the complainant by assignment, should not be a lien on any part of the property. The instrument contained the following recital :

“And whereas, by an arrangement between said John L. Pasman and the other parties, conveying the other undivided moiety of the said land hereinbefore described, the said John L. Pasman was to take for his share of the whole tracts of land devised by Catharine Pasman, deceased, to him and Amelia Ellen, wife of Ebenezer Montague, other lands than those conveyed to said Morrell, Davey, Mills and Vanderbeck, and is to assign to Ebenezer Montague the purchase-money mortgage given by said Morrell, Davey, Mills and Vanderbeck, and ought not to be liable upon the covenants contained in his deed hereinbefore recited.”

The instrument was signed by Morrell and his associates, and by the complainant.

By deed dated the 10th of April, 1854 (the same date as the last-mentioned deed), the complainant, for the consider-

Pasman v. Montague.

ation of \$20,000 as expressed in the deed, conveyed to Montague "all those lands situate on the east side of Palisade avenue, in the township of North Bergen, in the county of Hudson and the state of New Jersey, which was devised to the said John L. Pasman by the will of Catharine Pasman, deceased, and also a certain parcel of land situate on the west side of Palisade avenue—bounded on the east by Palisade avenue; on the north and west by land of William O. Davey, Benjamin Mills, Richard Morrell and Isaac I. Vanderbeck; on the south by land of Nathaniel Orr; excepting out of the land so devised by Catharine Pasman to John L. Pasman, so much as he has heretofore conveyed." This deed conveyed all the rest of the property. It was acknowledged on the 10th of April, 1854, the day of its date, and was recorded on the 16th of November, 1859.

The complainant's bill was filed on the 23d of May, 1876, nearly twenty-two years after the making of the last-mentioned deed. It states that the complainant never heard, until January, 1874, when the fact was stated to him by one of the witnesses to the will, in a casual conversation, that his mother had left a will, and that he did not know until 1876 what the contents of the will were, nor that she had left any real estate. It states that the complainant was induced to sign the before-mentioned deeds (except the deed to Montague, which it declares is a forgery), solely by his confidence in the statement of Montague and his wife to him; that the former had conveyed his land to him to put it out of the reach of his creditors, and his consequent belief that in making the conveyance, he was merely conveying property of which he had the legal title, through conveyance by Montague to him, but of which the former was the real owner. He prays that Montague may be decreed to be a trustee for him of his share of the proceeds of the lands which have been conveyed, and to account to him in the premises, and that the deed of April 10th, 1854, to Montague may be set aside.

Pasman v. Montague.

The case made by the bill is not sustained by the proof. In view of the deeds of conveyance executed by him, and especially of the statements contained in the deed of April 10th, 1854, from the complainant to Montague, and the recital in the instrument before mentioned, executed by Morrell, Davey, Mills and Vanderbeck, and the complainant, there can be no doubt that the complainant not only did not act, in conveying the property, under the belief that he was conveying land which had been conveyed to him by Montague, but that he did know of the existence of his mother's will. That will, as before stated, was proved within a month from the time of her death. It was proved before the surrogate of Hudson county, and by the oath of a witness who was not a member of the family. There is no evidence of concealment of the existence or proof of the will. That letters testamentary were not taken out upon it, was probably due to the fact that it was understood that the testatrix, in fact, left no estate. The deeds to the Smiths, and to the mayor and common council of Jersey City, were executed, not by him and his wife alone, as they would have been had the title been in him alone, but by Montague and his wife also. The deed from the complainant to Morrell and his associates was for an undivided half only, Montague and his wife conveying the other half by another deed. The instrument of writing executed by Morrell and his associates, and the complainant, explicitly stated the fact that the latter derived his title to the property through his mother's will.

The deed to Montague expressly conveys, by a description which not only refers to the will, but refers to it in such a way as that the contents of the conveyance could not have been made known to the complainant without disclosing the fact that the land thereby conveyed had been devised to him by his mother's will. It is insisted, indeed, on his behalf, that so much of the recital in the instrument in writing, executed by Morrell and his associates, and the complainant, as alleged that an arrangement existed by

Pasman v. Montague.

which the complainant was to be compensated for his interest in the lands conveyed, was false. That circumstance, however, only makes the evidence of notice to the complainant more clear, for the complainant, by the recital to which he put his hand and seal, not only knew that the title which he conveyed was derived through his mother's will, but that it was a title of absolute and beneficial ownership, and he could not have been deceived as to his rights when they were declared in full, and his compensation for his relinquishment of them was stated. If the statement as to compensation was untrue, it was so to his knowledge then, and he subscribed to it, probably, for the purpose of concealing the fact that his ownership was, in fact, understood by him to be morally merely legal and not beneficial.

Though the complainant says, and swears, that the deed to Montague is a forgery, the proof is clear to the contrary. The deed was drawn by Robert Gilchrist, who was employed by Morrell and his associates to guard their interests in the conveyance to them, and the acknowledgment was taken by him, as one of the masters of this court. Montague swears that Mr. Gilchrist required that the complainant should be identified, and he says the latter brought to him, accordingly, a person whom he knew. He says: "Mr. Gilchrist told him (the complainant) that it was necessary to have somebody to identify him. Pasman stepped out and brought in a man; I think his name was Shaw or Young; in a book-store, I think; with whom he told Mr. Gilchrist he was acquainted, before going, and Mr. Gilchrist told him to fetch the man in, as he was acquainted with him; I did not know the man." It appears, by the testimony of Robert B. Kashow, that he kept a book-store in Jersey City at that time; that there was no other person of the name of Kashow or Shaw then living or doing business in Jersey City, and that he then had in his employ a man by the name of Young. Mr. Gilchrist not only took the acknowledgment, but he witnessed the signature of the complainant. He appears to have been careful to be satisfied of the

Pasman v. Montague.

identity of the complainant. Both he and Mr. Mills recognize him.

And, further, the complainant admits that, on the same 10th day of April, 1854, he signed the deed to Morrell and his associates. It was signed in the presence of Mr. Gilchrist, and the acknowledgment was taken by him. Beyond dispute the complainant signed and acknowledged the deed to Montague. More than twenty years elapsed after the final transaction between the parties in reference to the property and the commencement of this suit. It is not surprising that the complainant's memory is at fault in regard to it.

It appears probable that the conveyance by Montague to his mother-in-law was merely a cover to protect the property from his creditors. He was about to apply for the benefit of the bankrupt law. For all the consideration (\$500) above the mortgage on the property, she gave to him her note, which does not appear to have been ever paid. She does not appear to have had any property. So far as the complainant knew, and, as he believed, and as appears, she was dependent on Montague for her support. He paid the taxes and assessments on the property, and it appears to have been understood that the property was his, in fact. The will was probably the means devised by which to secure to Montague the property after her death. That he was not in a condition to take the title himself safely is evident from the fact of the existence of the Hallock judgment before mentioned, which was recovered against him in 1843, for more than \$10,000. That the complainant knowingly took the title to other land belonging to Montague, appears from his own testimony. At the request of his sister, Mrs. Montague, he bought property in Illinois for Montague; took the title, and subsequently conveyed it by his direction. From the instrument of writing executed by Morrell and his associates, and the complainant, before referred to, it appears that when that instrument was executed the complainant held, by assignment, the Hallock judgment. That

Pasman v. Montague.

he was not ignorant of business also appears from his testimony. He bought and sold land on his own account in New York. He has owned three houses and lots in the city of New York, bought at different times, and sold by him, and owns a farm which he purchased in Orange county, in the state of New York.

The complainant regards as very important evidence in the cause, the fact that Montague gave him, as a gratuity (the complainant insists that it was "conscience-money"), the sum of \$1,800, in the year 1870. Montague swears that the complainant, on that occasion, applied to him and requested him to take an assignment of a mortgage for \$1,800 which was on his farm, the holder of which was pressing him for the money, and that he, while unwilling to take the mortgage, was disposed to relieve him in consideration of his honorable conduct towards him in the transactions which are under consideration in this suit. He says that the complainant accounted for the existence of the mortgage by saying that his son had been in some speculation, and that he had had to mortgage his farm for \$1,800.

The complainant, in his testimony, to the question asked on cross-examination, "How did that mortgage" (the mortgage on his farm) "come to be made?" answered, "I raised the money for a particular purpose." When asked "What purpose?" he replied, "I don't know as it is necessary to tell what I did with the money." He was then asked, "Was it to help your son?" and he answered, "I wanted it for different purposes." To the further question, "Was that one of them?" he replied, "I may have given him some money, too." While he admits that he applied to Montague to take an assignment of the mortgage, he says it was not on the occasion when Montague gave him the money. When asked, in that connection, what period of time there was between the two transactions, he replied, "Probably the mortgage was presented and the business was all settled before we had the other occurrence." His testimony on this point is so unsatisfactory as to deprive the

Pasman v. Montague.

fact that Montague gave him \$1,800, on which he placed so much reliance, of any significance whatever.

But his counsel insist that, if the proof will not sustain the charge of fraud, relief may be accorded to him on the ground of mistake; that is, on the ground that he did not know that his mother had left a will or had died seized of any land. But the same facts which disprove the allegation of fraud, on which his bill is based, equally disprove any allegation of mistake. And again, his bill is based on the allegation that he was induced to execute the deeds, which he admits having executed, by the representations of Montague and his wife; that the former had conveyed the property to him, and that he did not know of the existence of his mother's will or of her ownership of the property at her death. He cannot be permitted, now that the proof utterly fails to substantiate the allegations of his bill, to change his position and place his claim to relief on the ground that, though he voluntarily executed the deeds without the inducement of false representation, and with full knowledge of his mother's will and of her ownership of the property at her death, he did so under a misapprehension on his part as to the character of his ownership, that it was beneficial as well as legal. *Midmer v. Midmer's ex'rs*, 12 C. E. Gr. 548; *Hoyt v. Hoyt*, *Id.* 399; *Brantingham v. Brantingham*, 1 Beas. 160; *Fenaby v. Hobson*, 2 Phil. 255; *Hixson v. Lombard*, L. R. (1 H. L.) 324; *Glascott v. Lang*, 2 Phil. 315; *Montesquieu v. Sandys*, 18 Ves. 302; *Wilde v. Gibson*, 1 H. L. Rep. Cas. 605; *Archbold v. Commissioners &c.*, 2 *Id.* 440, 460.

The bill will be dismissed, with costs.

Tooker v. Sloan.

EMELINE TOOKER

v.

ELIZABETH SLOAN and others.

1. A wife, in order to settle a suit in which her husband was involved, and which he was very desirous of compromising, and which disturbed and, perhaps, distressed him, gave a mortgage on property the title whereto was in her.—*Held*, that the circumstances did not amount to duress.

2. A certificate of acknowledgment is not invalidated or affected by the want of recollection of the grantor or the commissioner as to the transaction.

3. A release by an attorney in fact of the holder of a mortgage, the latter having accepted the consideration from the former with knowledge of the release,—*Held*, binding on the principal though the attorney exceeded his authority in taking the release.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. John Linn, for complainant.

Mr. R. Wayne Parker, for Mrs. Sloan and Mrs. Mary Edwards.

Mr. W. Brinkerhoff, for Sistare.

Mr. E. D. Halsey, for Mrs. Allen.

THE CHANCELLOR.

This is a suit to foreclose a mortgage, dated December 31st, 1873, given by Daniel Sloan and his wife to Joseph S. Winston, on about twenty-one acres of land in Summit township, in Union county, to secure the payment of \$4,465.87, on or before the 31st of December, 1875, with interest, payable half-yearly. The mortgage was assigned

Tooker v. Sloan.

by Winston to the complainant by assignment dated March 24th, 1874. Sloan and his wife conveyed the property to Mary Ann Edwards, wife of Charles P. Edwards, by deed dated June 15th, 1875, subject to the complainant's mortgage, the payment of which the grantee thereby assumed as so much of the purchase-money. On the same day last mentioned, Mrs. Edwards and her husband mortgaged the property to James M. Crossman, by two mortgages, for \$4,225 and \$2,000, respectively, with interest. On the 15th of December following, they conveyed to Kate Edwards eighty-four one-hundredths of an acre of the property, for the consideration of \$500, all of which was paid to the attorney in fact of the complainant, in consideration of his releasing the premises so sold from the encumbrance of the complainant's mortgage. The attorney paid that money over to the complainant. Kate Edwards put upon the property so conveyed to her, a dwelling-house and other improvements of the value of about \$5,000. \$3,000 of the money expended thereon she borrowed of her mother, Mrs. Hannah M. Allen, on the security of a mortgage upon the property.

Sloan is dead. He died August 12th, 1866. Mrs. Sloan, by her answer, insists that the complainant's mortgage is invalid because, as she alleges, it was given under duress. She says that Winston obtained it by working on the apprehensions of her husband (then suffering from serious illness), through unlawful threats of arrest and imprisonment for crime falsely and groundlessly imputed to and charged upon him, by means whereof he was induced to gain her consent (which she gave merely to relieve him) to mortgage her property, the mortgaged premises, for Winston's benefit.

In 1871, the mortgaged premises (the whole twenty-one acres) were owned by Edwards, who, according to the statements of the answer of himself and his wife, in September of that year, conveyed it to Mr. Sloan and Granville A. Mendon, for the consideration of \$21,000, subject to a mortgage encumbrance of \$6,000 thereon. About the 6th of

Tooker v. Sloan.

May, 1873, the interest of Sloan and Mendon in the property was conveyed to Mrs. Sloan. In her answer, Mrs. Sloan states that the purchase-money of the sale of the property by Edwards to Sloan and Mendon, was not paid, but notes were given for it, and that the conveyance to Mrs. Edwards was made merely by way of mortgage in order to secure the payment of that money to Edwards, and that Edwards's claim for unpaid purchase-money under that deed ought to have priority over the complainant's mortgage. She also insists that she did not acknowledge the execution of the complainant's mortgage in such manner as to bind her estate in the land.

Edwards and his wife, by their answer, deny the validity of the complainant's mortgage for the same reason given in Mrs. Sloan's answer, and set up the lien for unpaid purchase-money, alleging that Edwards, after the conveyance to Sloan and Mendon, held possession of the premises in accordance with an understanding that he should do so as security for the payment of that money, and that that lien is entitled to priority over the complainant's mortgage. They claim, also, that he is entitled to subrogation in respect of the payment by him after the conveyance to Sloan and Mendon of the \$6,000 mortgage, subject to which the property was, as they allege, sold and conveyed to Sloan and Mendon. Kate Edwards and her husband, by their answer, set up the release to the former and insist on its validity. W. H. M. Sistare, by his answer, insists upon the priority of the Crossman mortgage assigned to him, on the ground that it was given to secure notes or endorsements of notes (or the renewals thereof) given by Sloan and Mendon on account of the before-mentioned purchase-money. Mrs. Allen sets up her mortgage upon the land conveyed to Kate Edwards, and insists upon the validity of the release.

It appears, by the testimony, that the complainant's mortgage was given to Mr. Winston by Sloan and his wife, in pursuance of the terms of a settlement of a claim which was made by stockholders of a company located in the city of

Tooker v. Sloan.

New York (The Mitchell Non-Explosive Boiler Company), against him, for his failure to perform his undertakings in regard to the company and its business interests, and his transactions in connection with its stock, whereby, as they alleged, they were prejudiced as stockholders. Mr. Winston, in consideration of the mortgage, was to pay certain claims against the company to the amount of the money secured by the mortgage. Sloan was represented by counsel in the litigation which was commenced against him, and in the consequent settlement of the matters in controversy. Though he was disturbed, and perhaps distressed, under the charges which were made against him, and was extremely anxious to effect a settlement of the claim, that fact is of itself, of course, not enough even to cast suspicion upon the conduct of those who were pressing him. It does not appear that they were not acting *bona fide*, nor does it appear that their charges were false and unfounded. The settlement provided for no payment to the stockholders, or any of them, directly, but merely for the payment of certain claims outstanding against the company. That he was not an imbecile, nor so affected in mind as to be unable to take care of his interests, abundantly appears. He was represented by counsel, as already stated, and was in daily consultation with his friend Crossman. So far as the action of his wife, in consenting to give the mortgage, is concerned, it is very evident that she was merely dealing with his property. She had never paid anything for the property, nor had she agreed to pay anything for it. It was bought by her husband and Mendon from Edwards, and she, herself, says that the purchase-money was never paid. They gave their notes or endorsements for the purchase-money, and the title was passed from them to her without any consideration whatever. She undoubtedly held it merely in trust for her husband.

Sloan continued to do business for more than a year after the giving of the mortgage. It is proved that in June, 1875, he made the arrangement (carried out on the 8th of July

Tooker v. Sloan.

following) with Crossman, by which the latter was to have security, by second mortgage on the mortgaged premises, for those of the notes or endorsements (or renewals thereof), given for purchase-money of the property, which Crossman had discounted, and which he held. By the arrangement Sloan and his wife were to convey the premises to Mrs. Edwards, who was to give the mortgage security to Crossman. This arrangement was made, and in pursuance thereof the notes were delivered up to Sloan, in consideration of the mortgages given to Crossman by Mr. and Mrs. Edwards. And, again, on the 20th of March, 1874, nearly three months after the complainant's mortgage was given, Sloan, with his wife, signed a certificate, by which, in consideration that the complainant was about to take an assignment of that mortgage, they certified to her that the mortgage was then a subsisting, valid, legal and equitable claim and encumbrance upon the property described in the mortgage, for the full amount of \$4,465.87, with interest from the date of the mortgage; that the amount thereof was justly due and owing by them to Winston, and that they had no defence whatever in law or equity against it or any part of it.

When it is considered that between the time when the mortgage was given and the time when this certificate was made, a period of many weeks had elapsed—time enough for reflection and all needed advice—and that at the latter period the mortgage was still in the hands of Winston, who as yet had paid nothing under it, nor raised any money on it, the fact that Sloan and his wife voluntarily gave this certificate to enable Winston to negotiate the mortgage, and to that end to induce the complainant to invest her money in it, is of no slight importance.

Mr. Crossman, who was sworn as a witness on the subject of Sloan's incapacity, not only does not establish it, but, on the contrary, shows his full competency to transact business. He says that, as to his bodily health, he should think Sloan was then in good condition. He testifies, indeed, that he

Tooker v. Sloan.

was extremely distressed through apprehension of the legal proceedings which were in contemplation, because of their effect on his reputation and that of his family, but his statement of the conversations between Sloan and himself on the subject, shows that the former was fully possessed of the requisite mental qualifications for the transaction of even that business. It is worthy of special note, too, that, as before stated, there is no evidence that he was not, in fact, justly liable to the charge made against him.

By the agreement of settlement Winston agreed to pay the debts for which the mortgage was given, and to indemnify Sloan and his wife against them, and all costs &c. on account of them. Both he and Tooker swear that those debts have been paid. There is, indeed, evidence that some of them have not been paid, but much of that evidence is far from satisfactory. Moreover, there is no evidence that Winston has not indemnified Sloan and his wife against the debts. And again, the answer of Mrs. Sloan sets up no defence on that head.

Nor is there any proof of the allegation, made in her answer, that the execution of the mortgage was not acknowledged in such manner as to bind her property. The certificate contains all the statutory requisites. The acknowledgment was made before a duly authorized person in New York, and the certificate required by law as to the authority of the person by whom the acknowledgment was taken, accompanied the certificate of acknowledgment. There is no evidence to overthrow the certificate of acknowledgment. That the officer by whom the acknowledgment was taken cannot recollect that he examined her separate and apart from her husband, and that she cannot remember whether she was so examined or not, of course cannot countervail the certificate.

The claim of paramount lien for purchase-money has not been established. Edwards himself never claimed any lien on that account until after the commencement of this suit. When, before the complainant took the assignment of her

Tooker v. Sloan.

mortgage, her husband went to the mortgaged premises, and there saw Edwards, the latter not only did not set up any claim of lien for unpaid purchase-money, but told Mr. Tooker when it was that he sold the property to Sloan, and how he came to sell it to him; what the land was worth; that he had been paid all the purchase-money, and urged Mr. Tooker to take the mortgage, and said that it was a good, valid and perfect mortgage in every way, and would, undoubtedly, be paid at maturity. He further said that, if Tooker bought the mortgage, he would like him to see if he (Tooker) could not buy the land and sell him a part of it. He further said that he had possession of the property for drying paper (he was a manufacturer of paper), as a privilege from Sloan, in consideration of his paying the taxes and keeping up the fences. And when, after the complainant had become the owner of the mortgage, her husband and Winston, on the 4th of July, 1876, went there, Edwards, in reply to the interrogative remark of Mr. Tooker, "I suppose you have received your pay from Mr. Sloan for this property?" said, "Yes; Mr. Sloan does not owe me a cent on it." Winston swears that, in the same conversation, Edwards, who was very anxious to obtain a part of the property, asked Mr. Tooker if he thought he (Tooker) could negotiate with Sloan and buy the property; to which Tooker said that Sloan was anxious to sell it to him, at some price; and Edwards then said, if Mr. Tooker would purchase it, he would give him \$9,000 for a certain portion of it, which he designated. Again, in 1876, when endeavoring to induce Mr. Tooker to wait longer for the unpaid interest on the mortgage, he said, "Why need you be in any hurry for your interest? you know you have got a good mortgage there—just as good as gold;" and, though he earnestly requested Mr. Tooker and Mr. Byrne, the complainant's solicitor, not to foreclose, and urged them to give him time to raise the money to take up the mortgage, he at no time mentioned any claim of lien for unpaid purchase-money,

Tooker v. Sloan.

although he threatened to "give the complainant a long fight for her money if she would not wait."

Nor is the claim made in the answer of Edwards and his wife, that the conveyance to the latter was merely by way of mortgage to secure the unpaid purchase-money, sustained. The only witnesses who speak on the subject are Mrs. Sloan and Mrs. Edwards, and it is manifest that neither of them had any personal knowledge of such arrangement. All they know on the subject was derived from their respective husbands, who were, it seems quite probable, the real parties in interest. The arrangement for the giving of the two mortgages to Crossman was made between Sloan and Crossman. The latter testifies as follows, in reference to it: "Sloan was indebted to me, and, in order to cancel that indebtedness—Mr. Edwards had long wanted the property; in fact, he had wanted it ever since Mr. Sloan purchased it, and offered to buy it back of him, and he would buy it back and give me a mortgage to cover the entire indebtedness." To the question, "Then you say that he (Sloan) procured a mortgage from Charles P. Edwards and wife to you, upon this Summit property, to secure that indebtedness?" he answered: "Indebtedness! the reverse of that. I said that he sold this property to Edwards, and Edwards gave this mortgage to me, direct." This was in June, 1875, and the deed from Sloan and his wife to Mrs. Edwards was made at that time, and Edwards and his wife then gave the two mortgages to Crossman. Crossman says he understood that his mortgages were subsequent to the complainant's mortgage. The claim to subrogation is not established. Both of the mortgages, which were on the property when Edwards conveyed to Sloan, appear to have been cancelled of record, on the application of Sloan himself, and there is no evidence that Edwards paid or contributed to the payment of either of them.

The complainant insists that she is not bound by the release executed in favor of Mrs. Kate Edwards by Mr. Byrne, as her attorney in fact, releasing eighty-four one-

Tooker v. Sloan.

hundredths of an acre of the mortgaged premises from her mortgage. She was, when the release was executed (December 20th, 1875), in Europe, with her husband. She returned in August, 1876. Her mortgage became due on the 31st of December, 1875, eleven days after the release was executed. Mr. Byrne had authority to receive the principal of the mortgage when due, as before stated; it was not due when the release was given, but would be in eleven days. He executed the release, and soon afterwards (by letter of March 9th, 1876) sent the consideration, \$500, which was all that was paid for the property, to his principal, as and for so much money received in consideration of the release. She retained the money, acknowledging the receipt of it by letter of April 9th following. In a settlement and account made by him with her in October, 1876, Mr. Byrne charged himself with \$500 of principal received from Kate Edwards on account of Mrs. Sloan's bond, and the complainant received the benefit of the amount in the settlement, Mr. Byrne paying the balance of the account, and that amount being credited to the complainant therein. On the faith of the release, Kate Edwards, having raised money from her mother, Mrs. Allen, on mortgage of the property, proceeded to improve it, and expended, in building a dwelling-house and putting other improvements thereon, about \$5,000. Mrs. Allen took her mortgage on the faith of the release. The price paid for the property, which was unimproved, is proved to have been a full price for it, and the house and other improvements so enhanced the value of the rest of the mortgaged premises that Crossman released the property from his mortgages without other consideration. It is true, Mr. Tooker says there was dissatisfaction on his part with the action of Mr. Byrne in receiving the \$500 of principal. He says it was because the latter had no right to receive it; but though Mr. Byrne swears that he notified Mr. Tooker, by letter, of the fact that he had released to Mrs. Kate Edwards part of the property, for \$500, soon after the transaction took place, Mr. Tooker explicitly

Tooker v. Sloan.

declines to produce the letters received by him from Mr. Byrne.

Mr. Byrne says that after Mr. and Mrs. Tooker returned to this country, the former found fault with him for having released the property, but it was merely because there was, as Tooker said, a building of some kind (his impression is it was a blacksmith's shop) upon it. According to the proof, however, there was no building on the premises. Mr. Tooker says he expressed his dissatisfaction with the release, but it was expressed to Charles P. Edwards, not to Kate Edwards or her husband. It appears, beyond controversy, that the complainant received, with full knowledge of the circumstances, the amount paid by Kate Edwards for the property. Though Mr. Tooker says he tendered the money back, it was not to Kate Edwards but to Charles P. Edwards. The complainant is in equity bound by the release. She ought, if she had intended to repudiate the act of her agent, to have done so as soon as it came to her knowledge. She did not do so, but, on the contrary, received and retained, with full knowledge of the facts, the consideration of the release, and it was not until after she returned from Europe that any dissatisfaction was expressed in regard to it, and on the 9th of October, 1875, about ten months after the release was given, she allowed the consideration money of the release in her agent's account. She has acquiesced in her agent's action in giving the release, and she cannot now be permitted to repudiate it to the damage of the purchaser or the mortgagee—the former of whom, in reliance upon it, has made large expenditures upon the property, and the latter, in like confidence, has loaned her money on the security of the premises.

There will be a decree in accordance with these views.

Pine v. Shannon.

LOUISA E. PINE

v.

JOHN SHANNON and others.

On a bill to foreclose a mortgage belonging to a wife, a mere averment that the owner of the premises falsely alleges that it is unsafe for him to pay the amount of the mortgaged debt, because of a foreign attachment issued against complainant's husband, without stating any connection between the attachment proceedings and the mortgage, is insufficient.

Bill to foreclose and for injunction. On general demurrer, by George Van Horne.

Mr. George Van Horne, demurrant, *in pro. pers.*

Mr. S. C. Mount, for complainant.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage on land in Hudson county, now owned by Willard E. Dudley. It also prays an injunction against the defendants Dudley and Van Horne, to restrain the latter from further prosecuting a foreign attachment issued out of the Hudson circuit court, in his favor, against John W. Pine, the complainant's husband, and the complainant; and to restrain Dudley from paying any money in or by virtue of the proceedings in that attachment, or to any one other than the complainant, out of the money due on the bond and mortgage. The bill does not allege that the money, or any part of it, due or payable on the bond and mortgage, has been attached, or that the attachment, or any of the proceedings thereunder, in anywise embarrass the complainant's suit to foreclose or prevent Dudley in any way from paying the money secured by the mortgage to the complainant. The statements of the bill in no way connect the attachment or the proceedings there-

Polhemus v. Emson.

under with the mortgage or the mortgage debt. For aught that appears, it has no connection whatever therewith.

The bill merely alleges that Dudley pretends that, because of the attachment and proceedings thereunder, he cannot safely pay the mortgage debt to the complainant; and the complainant avers that the attachment is not based on any debt due from her. On the face of the bill, there does not appear to be any reason for making Van Horne a party to this suit. The only relief prayed against him is an injunction restraining him from proceeding in the attachment. If there is no connection between the attachment and the mortgage debt, he, of course, ought not to be required to answer the bill. If Dudley falsely pretends that the attachment and the proceedings thereunder render it unsafe for him to pay the mortgage debt to the complainant, that of itself is no reason why Van Horne should be required to answer the bill. The bill is deficient in averment. The demurrer will be allowed, with costs, and the complainant will have leave to amend, on payment of the costs of the demurrer.

JOB POLHEMUS

v.

EPHRAIM P. EMSON.

In a partition of lands, in equity, between one tenant in common and the purchaser of his co-tenant's share under an execution at law, where the co-tenant has wasted part of the land before the sheriff's sale, the part so wasted must be set off to such purchaser.

Bill for relief. On final hearing on pleadings and proofs.

Polhemus v. Emson.

Mr. C. Ewan Merritt and *Mr. James Wilson*, for complainant.

Mr. Joel Parker, for defendant.

THE CHANCELLOR.

The facts in this case are fully stated in a former opinion (*Polhemus v. Emson*, 12 C. E. Gr. 190). This suit is brought for relief against a partition which, when the bill was filed, was about to be made at law of a tract of woodland in Ocean county. The land was held by the complainant and Emanuel Hodson, as tenants in common, from May 1st, 1852, up to August 21st, 1865, when a voluntary partition thereof, by deed, was made between them. In 1861, the defendant recovered a judgment, in the court of common pleas of Ocean county, against Hodson, and, in 1871, under an execution thereon, caused Hodson's interest in the property to be sold, and purchased it at the sheriff's sale. After obtaining a deed from the sheriff, he instituted proceedings at law for partition between him and the complainant, and this suit was brought for relief against that partition. In 1869, three years before the sheriff's sale, Hodson sold the timber off the part of the land which had been assigned to him in the voluntary partition between him and the complainant. On the part assigned to Polhemus, the timber still remained. There were no improvements on the land, and it is of little or no value without the timber. When this cause was brought to final hearing, in 1876, it was decreed that the voluntary partition was binding on Emson, the judgment creditor. This view was not concurred in by the court of errors and appeals (*Emson v. Polhemus*, 1 Stew. 439), and the decree was, therefore, reversed, and the record remitted to this court, with direction that the cause be proceeded in here according to the law and the practice of this court. A motion was thereupon made in this court to dismiss the bill. It was denied on the ground that the appellate tribunal had

Polhemus v. Emson.

not passed upon the question of the right of the complainant to have the partition made on equitable terms. *Polhemus v. Emson*, 1 *Stew.* 576. From the order made on that decision, an appeal was taken which resulted in an affirmance. *Polhemus v. Emson*, 2 *Stew.* 583. The complainant having amended the prayer of his bill so as more distinctly to ask for partition on equitable terms, the cause again came on for final hearing.

It is very clear that, unless the wasted part of the land in question is assigned in partition to Emson, a great wrong will be done to Polhemus. There is no doubt that equity can prevent the injustice. If, instead of divesting the part of the land assigned to him of its timber, and so depriving it of its value, Hodson had put valuable improvements upon it, the purchaser under the judgment would, in equity, have been entitled to the benefit of those improvements. Polhemus would have had no claim, in equity, to them. If Polhemus had wasted his part of the property, he would have been compelled, in equity, to take it in the partition between him and the purchaser under the judgment. Equity requires that a purchaser of a judgment debtor's interest, as tenant in common of land, should, on the one hand, have the benefit of the equities in favor of the judgment debtor, as between him and his co-tenant; and that, on the other hand, he should take it subject to the equities against the judgment debtor in respect of waste committed by him.

The partition will be made under the direction of this court, and the commissioners will be ordered, in making it, to assign to Emson, for or on account of his share, the part assigned to Hodson in the voluntary partition, at the value thereof when that partition was made.

The National Trust Co. v. Murphy.

THE NATIONAL TRUST COMPANY

v.

THOMAS MURPHY and wife, and another.

1. A foreign corporation took a mortgage on lands in this state, to secure a loan already made to the mortgagor, on stock collateral, which became depreciated.—*Held*, that although its charter may not have authorized the taking of a mortgage in another state, as an original investment, yet the corporation might take such mortgage by way of additional security for such loan, and the mortgage, in its hands, is valid.

2. Where a receiver of a foreign corporation, complainant, has been appointed in another state, since the beginning of the suit, he may be substituted as complainant on such terms as may be imposed by the court, for the protection of creditors of such corporation, who are citizens of this state.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. J. D. Bedle, for complainant.

Mr. R. S. Green, for defendant Murphy and wife.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage given August 26th, 1875, by Thomas Murphy and his wife, to the complainants, on land at Long Branch, in the county of Monmouth, to secure the payment of \$45,000 on the 31st of the same month of August, with interest. Murphy and his wife, by their answer, admit the giving of the mortgage, and of the bond (which was made by Murphy, and is of even date with the mortgage), the payment of which the mortgage was made to secure; and they allege that, some time previous to the date of the mortgage, the complainants lent to Murphy the sum of \$45,000, taking his promissory note for the payment thereof, with interest, with \$50,000 worth of the capital stock of The Commercial Warehouse Company, a corporation under the laws of New York, as security, and that the bond and mortgage were subsequently

The National Trust Co. v. Murphy.

given at the solicitation of the complainants, and simply as a further security for the indebtedness for which they held the stock, and they insist that the complainants should be required to subject the stock to the payment of the debt before having recourse to the mortgage. They set up, as a defence to this suit, that the complainants, by their charter, had no power or authority to take or hold a mortgage on real estate in New Jersey or elsewhere than in the state of New York; and that, in taking the mortgage in question, they acted *ultra vires*, and they insist that, therefore, the mortgage created no lien on the land and premises therein mentioned. The only question presented on the hearing was, whether, in view of that objection to it, the mortgage is a valid security in the hands of the complainants.

It will have been seen that the answer alleges that the mortgage was taken merely as further security for a loan which had been made on the security of the stock of the warehouse company, and that the giving of the mortgage did not enter into the agreement for the loan. The proof is, that the loan was made in November, 1874; that it was made merely on the security of the note and warehouse company stock, and that the stock was, at that time, ample security therefor; that, in 1875, the warehouse company suspended, and thereupon, and because of the depreciation of the stock caused thereby, the complainants required Murphy to pay the debt, or give further satisfactory security for it. He, alleging that he could not conveniently pay the debt, undertook to make it perfectly secure by mortgage of his real estate at Long Branch (the mortgaged premises), at the same time stating that he expected soon to obtain the money to pay the debt by the sale of some other real property in the city of New York.

The charter of the complainants gives to their trustees a discretionary power of investing the moneys received by them in trust, in public stocks of the United States, or of any state, or the bonds or stock of any incorporated city in the state of New York, authorized by law, or on interest-

The National Trust Co. v. Murphy.

paying first mortgage bonds, or on bonds and mortgages on unencumbered real estate in the state of New York worth double the amount loaned thereon, and authorizes them to make loans secured by dividend-paying stocks of any corporation or company, with proviso as to the rates at which such stocks are to be taken as collateral. The evidence shows that the loan in this case was made in accordance with the charter. It was not an investment. The mortgage in suit was taken, according to the answer, as well as the proof, as further and additional collateral security, in view of the subsequent depreciation of the stock upon the security of which the loan was made. The charter contains no prohibition, expressed or implied, against accepting or holding mortgages of real estate situated elsewhere than in the state of New York as additional security. If it be conceded that it, by implication, forbids the making of any investment on mortgage of real estate not in the state of New York, it does not prohibit the company from taking further security by such mortgage for an investment already legitimately made. If the company should find that any of their investments, duly made, were in danger, they might, for aught contained in the charter to the contrary, take additional security, by mortgage of lands situated out of the state of New York. Any other construction would be unreasonable. Inasmuch as there is nothing in the charter to prohibit them from taking a mortgage of lands in this state, in such case, their rights, under such mortgage, would be recognized and protected here. *N. Y. Dry Dock Co. v. Hicks*, 5 *McLean* 111. By our statute (*Rev.* p. 195, § 99), mortgages to or by foreign corporations of lands in this state are declared to be good and valid here, both at law and in equity. But, as before remarked, the mortgage in this case was not taken to secure an investment, but to protect the complainants from loss by the depreciation of the securities taken in accordance with the charter, for security for the repayment of the loan. It is, undoubtedly, valid.

Mayer v. Mayer.

The complainants are entitled to a decree of foreclosure and sale.

It was alleged, upon the hearing, and it appears that, since the commencement of this suit, the complainants have been restrained by injunction, issued out of the supreme court of New York, from exercising any of their franchises, or doing any corporate act, and that a receiver of their property has been duly appointed. The complainants' counsel moves that the receiver be substituted as complainant in the stead of the company. The substitution will be made on such terms as this court may deem proper to impose for the protection of any of the citizens of this state who may be creditors of the company, and for securing obedience on the part of the receiver to the orders of this court in respect to the money which may be collected by him in this suit.

DELIA M. MAYER

v.

WALTER J. MAYER.

A husband and wife were living with the wife's father; the latter upbraided the husband for some trivial offence, whereupon the husband left the house, requesting his wife to go with him. She refused, and has never since then (in 1872) offered to live with him, or expressed any willingness to do so. Her bill filed for a divorce for desertion dismissed, in view of the facts.

Petition for divorce from the bond of matrimony. On final hearing.

Mr. Aram G. Sayre, for petitioner.

Norwood v. De Hart.

THE CHANCELLOR.

The evidence does not establish desertion. The parties lived together in the family of the complainant's father, in 1872. In February or March of that year the complainant's father upbraided the defendant for staying out of the house until late at night, and said to him that, if he could not do better, in that respect, he must leave the house. The defendant then declared that he would go at once, and asked the complainant to go with him. She refused to go. He went. It appears that he returned to the house on two occasions: On the first he went for his trunk. His wife was not at home at the time. Her mother appears to have treated him with some harshness then. On the next occasion, which was about three years afterwards, he went to see his wife, but was not permitted to do so. Her father met him at the gate, and, as she says, forbade his seeing her. This was in 1875. She has never, since she refused to go with her husband, so far as appears, offered to live with him, or expressed her willingness to do so; on the contrary, she seems to have been unwilling to live with him.

The bill must be dismissed.

JOHN NORWOOD and others, executors,

v.

CHARLES C. DE HART and others.

The liability of a grantee who assumes the payment of a mortgage on lands conveyed to him, depends upon the personal liability of his immediate grantor; therefore, if a grantor is not so liable, the mortgagee can not claim any deficiency from such grantee.

On bill and general demurrer by De Hart.

Norwood v. De Hart.

Mr. H. C. Pitney and F. A. Johnson, for the demurrer.

Mr. A. W. Bell, contra.

THE CHANCELLOR.

This suit is brought to obtain a decree against the defendants for the amount remaining unpaid upon a decree in favor of the complainants in a suit for foreclosure of mortgage upon premises which were owned by the defendants respectively, at different times, subject to the mortgage. The mortgaged premises were sold under the execution issued on the decree in that suit, and were purchased by the holder of a mortgage prior to that of the complainants', for a sum less than the amount due on his mortgage, so that nothing was realized by the complainants on their mortgage.

The bill states that the complainants' mortgage, which is for \$2,000 and interest, was given by Charles Meyenberg, on or about the 20th of July, 1869; that the prior mortgage, which was for \$2,000 and interest, was given in 1868, by Frank Hunkley; that in May, 1871, one Nicholas Pflaum, then being the owner of the mortgaged premises, and both of the mortgages being subsisting liens thereon for the full amount of the principal thereof, conveyed the property to De Hart, for the consideration of \$10,000, as stated in the deed; that the deed contained the declaration and acknowledgment that the conveyance was made subject to the mortgages, and that the principal thereof was computed as part of the purchase-money, and contained, also, the stipulation that the existence of the mortgages should not be held to work a breach of any of the covenants in the deed; that in August, 1871, De Hart conveyed the premises to Benjamin Sire expressly subject to those mortgages and a subsequent one for \$1,000 and interest, which had been given thereon by De Hart; that the deed to Sire contained the declaration that the principal of those mortgages was computed as so much of the purchase-money of the property; that in Sep-

Norwood v. De Hart.

tember, 1871, Sire conveyed the property to Moses H. Williams, expressly subject to the three mortgages, and Williams therein assumed the payment of them; that Williams afterwards died, and the executors of his will, in March, 1873, conveyed their right, title and interest in and to the property, to De Hart, subject to the three mortgages, the payment of which he thereby assumed; that subsequently, in December, 1873, De Hart sold and conveyed all his interest in the premises to the defendant Genung, subject, as stated in the deed, to the encumbrance of two mortgages, the principal of which amounted to \$4,000, the payment of which Genung thereby expressly assumed; and that, in January, 1872, the complainants' testator began the above-mentioned suit for foreclosure, which resulted as before stated.

The complainants' claim to a decree against the defendants, rests on the ground that the creditor is entitled to the benefit of all the collateral securities which the debtor has obtained to re-enforce the primary obligation. *Klapworth v. Dressler*, 2 *Beas.* 62. But a mortgagee cannot avail himself of an assumption to pay his mortgage contained in a deed to a subsequent purchaser, unless the grantor was himself personally liable to pay the debt. *Crowell v. Hospital of St. Barnabas*, 12 *C. E. Gr.* 650, 656; *King v. Whitely*, 10 *Paige* 465; *Trotter v. Hughes*, 12 *N. Y.* 74. In this case, it does not appear, from the bill, that De Hart's grantor, Pflaum, was personally liable for the payment of the complainants' mortgage. It, therefore, does not appear (giving to the acknowledgment contained in the conveyance from Pflaum to De Hart, that the mortgage debt was allowed as part of the consideration of the conveyance, all the effect which, under the decision of this court in *Tichenor v. Dodd*, 3 *Gr. Ch.* 454, it would have as between grantor and grantee) that there has ever existed any obligation, on the part of De Hart, to indemnify Pflaum against the complainants' mortgage debt. And this consideration is equally fatal to the claim made under the assumption contained in the

Campbell v. Campbell.

deed from the executors of Williams, for it does not appear that they were liable to indemnify their grantor. Each grantee who assumed the payment of the mortgages was bound thereby only to indemnify, and if no liability to pay the mortgage debt existed on the part of his immediate grantor, there is no ground for claim of indemnity on the part of the grantor, and, consequently, no personal liability on the part of the grantee to pay the mortgage debt.

The fact that it does not appear that Pflaum was personally liable to pay the mortgage debt, is fatal to the claim of the complainants against the demurrant.

The demurrer will be sustained, with costs.

HULDAH T. CAMPBELL

v.

PETER F. CAMPBELL and others.

On a bill for dower in lands of an intestate, of three kinds: (1) that which was subject to a mortgage put thereon by the intestate; (2) that which was purchased by him subject to a mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment thereof assumed by him; and (3) that which belonged to him as a member of a partnership,—*Held*,

(1) That, as to the first class, the personal estate must exonerate the land, and dower be assigned therefrom as if unencumbered.

(2) That, as to the second class, a mere assumption of a mortgage by a decedent is not such proof of an intention to make the debt his own as renders his personal estate primarily liable therefor, and dower must be assigned therefrom, subject to the mortgage.

(3) That, as to the third class, dower must be assigned, subject to the equitable adjustment of the claims of the partnership creditors, and of the partners *inter sese*.

Bill for dower. On final hearing on pleadings and proofs.

Campbell v. Campbell.

Messrs. Collins & Corbin, for complainant.

Mr. Wm. A. Lewis, for defendants.

THE CHANCELLOR.

Neil Campbell died in 1877, intestate, leaving a widow, but no children. His heirs at law are his brothers and a sister. His widow files her bill for discovery, and to ascertain and establish her rights as to dower, and for the assignment of her dower accordingly, in certain real estate in this state, of which he died seized, or in which he had an interest. For a number of years prior to his death he was engaged in business, in partnership with Richard C. Washburn, under the firm name of Washburn & Campbell. The business of the firm is not yet completely settled. Mr. Campbell was, at his death, the owner of real estate which was his individual property, and he was interested, as a partner, in real estate which belonged to the firm of Washburn & Campbell. Of the real estate owned by him, individually, some was free from mortgage, some was subject to mortgage which had been put upon it by him, and the rest was subject to mortgage which was upon it when he bought it, and subject to which it was conveyed to him, the amount of the mortgage being allowed to him as so much of the purchase-money of the property, and he having expressly, as between him and his grantor, assumed the payment thereof.

It is, of course, unnecessary to speak of the real estate owned by him individually which was not subject to any encumbrance. It is almost equally so with regard to that part of such real estate which is subject to mortgage put thereon by him. His personal estate is bound to exonerate that land from the burden of the mortgage. *Keene v. Munn*, 1 C. E. Gr. 398; *McLenahan v. McLenahan*, 3 C. E. Gr. 101.

As to that which was purchased by him subject to mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment whereof he assumed, his personal estate is not bound to exoneration.

Campbell v. Campbell.

In such case, to make his personal estate primarily liable, there must be clear evidence of an intention to make the mortgage debt his own. The weight of authority, both in this country and in England, is, that the personal estate is not primarily liable, unless the grantee has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has in some other way manifested an intention to throw the burden on the personalty. But the point under consideration was directly passed upon and decided in *McLenahan v. McLenahan*, *ubi sup.* There the amount of the mortgage had been allowed to the intestate as so much of the purchase-money. See, also, *Crowell v. Hospital of Saint Barnabas*, 12 C. E. Gr. 650, and *King v. Whiteley*, 1 Hoffm. Ch. 477.

The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subjected to the doctrine of equitable conversion, so far as necessary for the purposes of the partnership, but otherwise it retains its legal character and incidents. It is, in equity, chargeable with the debts of the copartnership and any balance which may be due from one copartner to another, on the winding up of the affairs of the firm, and as between the heirs at law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining, after paying the debts and adjusting all the equitable claims of the different members of the firm as between themselves, is to be considered and treated as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims. *Uhler v. Semple*, 5 C. E. Gr. 228; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Shearer v. Shearer*, 108 Mass. 107; 1 Washb. on R. P. (4th ed.) 669; 1 Scribner on Dower 536; *Foster's Appeal*, 74 Pa. St. 391.

Shurts v. Howell.

MICHAEL SHURTS, executor &c.,

v.

ELLEN M. HOWELL and others.

A surety on a guardian's bond paid more than his aliquot share on account of his liability for such guardian's waste. He afterwards died, and also one of his co-sureties.—*Held*, that the executor of the first-named surety might, without having recovered a judgment at law, file a creditor's bill against the administrator and daughter of the co-surety, to set aside a mortgage given voluntarily by the co-surety to such daughter, and also to recover, from the co-surety's estate, the excess paid by his testator.

Bill for relief. On bill and demurrer.

Mr. H. S. Harris, for the demurrer.

Mr. John T. Bird, for complainant.

THE CHANCELLOR.

It appears by the bill, that in March, 1866, Peter H. Aller, the complainant's testator, and Charles Howell, executed, with Isaac Wilcox, and as sureties for him therein, a bond given by him as guardian of his daughter, Hester Ann Wilcox, a minor, in the penalty of \$7,000, to the ordinary of this state. The estate of the minor, to the amount of \$3,285, came into the hands of the guardian, and was entirely wasted by him. Subsequently, in the year 1872, he was, on that account, and on account of his insolvency, removed from his office of guardian by the orphans court of Hunterdon county, and John Hull was, in March, 1874, appointed guardian in his stead. In April, 1874, Aller was, on inquisition, duly found to be a lunatic, and the complainant was appointed his guardian. On the 1st of April, 1876, the complainant, as such guardian (Wilcox being utterly insolvent), paid to Hull, as guardian of the minor, \$2,000, on account, and in part discharge of the liability of Aller on

Shurts v. Howell.

the bond. In the same month of April, Aller having died, leaving a will, of which the complainant was executor, the latter paid to Hull, as executor, the further sum of \$1,996, in complete discharge of that liability. Howell died in 1875, intestate. After payment of the \$2,000, the complainant applied to him for contribution, which was refused. The \$1,996 were paid after his death. Since his death his administrator has refused to make contribution. Howell's estate has been declared insolvent. It appears that the personal estate amounts to only \$54.50, and the real estate is valued at \$2,925; that the claims presented amount to \$3,845.68, of which, it is claimed, \$3,235.33 are preferred debts. The complainant has not presented his claim. The administrator of Howell was, when the bill was filed, about to sell the lands of which Howell died seized, under an order of the orphans' court. They were and are subject to a mortgage of \$2,000, dated the 29th of July, 1873, given by the intestate to his daughter, the defendant, Ellen M. Howell. She presented her claim on the bond to the administrator for payment, in due form, and in due time.

The bill alleges that the bond and mortgage were wholly voluntary, were made without consideration, and to hinder, delay and defeat the creditors of Charles Howell; that the administrator must, necessarily, under the proceedings in the orphans court, sell the land subject to the mortgage, and, though fraudulent, it would still be an apparent encumbrance and a cloud upon the title. The complainant, therefore, comes into this court for aid in the premises. If the claim under the mortgage is here declared to be fraudulent, he will then be able, through the sale of the real estate, to obtain payment of his debt.

The demurrer is a general one, and is filed by the administrator and Ellen M. Howell. The demurrants object that it does not appear, by the bill, that the complainant is a creditor of the estate of Howell; that the bill is multifarious; that the facts relied upon are not stated with positiveness, and

Shurts v. Howell.

that the complainant has no standing in the cause, because he is not a judgment creditor.

That, under the circumstances stated in the bill, the estate of Howell is, in equity, liable to the complainant for contribution cannot be doubted. *De Colyar on Guaranties* 344. One of the objects of this suit is to establish that liability. The bill alleges that Howell, the intestate, and Allen, the testator, became co-sureties for Wilcox; that Wilcox became, in 1872, and ever since has been, and still is, insolvent; that the complainant, as guardian of Aller, was compelled to pay \$2,000 of the money, for the payment of which Aller and Howell were sureties, and, as executor, the further sum of \$1,996; that Howell's estate is declared to be insolvent, and that the insolvency arises from the fact that his daughter claims to be a creditor, by bond, for \$2,000 and interest, secured by mortgage on her father's real property; that those instruments were merely voluntary, and were made in view of Howell's liability, as surety for Wilcox, with Aller, and to hinder, delay and defeat Howell's creditors. It seeks to set aside the bond and mortgage, for the benefit of the complainant, but failing that, for the benefit of all the creditors. If it be set aside there will be assets enough to pay all of Howell's debts, including the debt due to the complainant for contribution.

For the purpose of merely setting aside the fraudulent conveyance, it is not necessary that the complainant should have a judgment at law or decree in equity. *Loomis v. Tift*, 16 Barb. 541; *Phelps v. Clapp*, 50 Barb. 430; *Richards v. Smallwood*, 1 Jac. 552; *Reese River Silver Mining Co. v. Atwell*, L. R. (7 Eq.) 346; *Adames v. Hallett*, L. R. (6 Eq.) 468; *Skarf v. Soulby*, 1 Mac. & G. 364; *Haston v. Castner*, 2 Stew. 536. Proceedings at law to establish the debt, if successful, and resulting in a judgment, would give him no lien upon the estate of Howell. It could do no more, at best, than to establish the debt. He not only seeks in this suit to establish it, but he asks, also, that, when it shall have been established, this court will aid him in collecting it, by declaring

Zeller v. Adam.

the encumbrance put upon the property by Howell, in favor of his daughter, and the alleged debt which it purports to have been made to secure, to be fraudulent at least as against him. He seeks thus to obtain for administration, by rescuing them from fraudulent hands, assets of the estate which cannot otherwise be reached. Clearly a creditor of a deceased person, though his claim be not in judgment, may obtain such relief in this court. *Skarf v. Soulby* and *Adames v. Hallett, supra*. Nor is the bill multifarious. It has only the purposes above indicated. The administrator is a necessary party, for the complainant not only seeks, by his bill, to establish a claim against the estate, but he asks an injunction to restrain the administrator from paying any money to the daughter, by way of dividend, out of the estate in his hands. Ellen M. Howell is, of course, interested in the question of the establishment of the complainant's debt, as well as in the main object of the suit. The purposes of the bill are germane to each other. Indeed, it may be said that the bill has but a single purpose, to reach assets in the hands of the daughter to be applied to or towards the satisfaction of the complainant's debt.

The facts stated in the bill on which the complainant relies for the relief which he seeks, are stated with sufficient certainty and clearness.

The demurrer will be overruled, with costs.

EDWARD ZELLER

v.

LOUIS ADAM and others.

A deed for a brewery was given, and, at the same time, a separate bill of sale covering the steam-engine, beer-kettles, etc., then in the buildings and used therein, the avowed intention being to enable the purchasers to remove such fixtures, if they saw fit. A mortgage for

Zeller v. Adam.

part of the purchase-money, containing a description of the land only, was executed at the same time. Afterwards, another mortgage, expressly including the fixtures mentioned in the bill of sale, was given, and a judgment was recovered against the purchasers, under which the fixtures were levied on.—*Held*, that, as between the first mortgagee and second mortgagee, and judgment creditor, the fixtures are not included in the first mortgage.

Bill to foreclose, on petition and proofs.

Mr. A. Q. Keasbey, for petitioners.

Mr. T. S. Henry, for complainant.

THE CHANCELLOR.

There is a decree for foreclosure and sale of mortgaged premises in this suit, to pay, in the first place, to the complainant, \$54,881.94, the balance due on a mortgage given by the members of the firm of Wackenhuth, Adam & Co., to Frederick Kolb, now deceased, for \$90,000 and interest, part of the purchase-money (\$130,000) of a brewery in Newark, with its appurtenances, and certain personal property used therein, and in connection with the business; and in the next place, to the petitioners, \$51,322.22 due them on a subsequent mortgage on the premises, and the sum of \$17,535.56, due them on a judgment against the owners of the property. The complainant's mortgage, by its terms, covers fourteen tracts of land, with the appurtenances. The petitioners' mortgage covers the same land, with the appurtenances, and also expressly includes the steam-engine and boiler, with the shafting and belting connected therewith in the brewery, fixtures, implements and materials on the premises, including copper kettles, wash tubs, fermenting tubs, barrels, hogsheads, wagons, and all other personal property used in connection with the brewery. Under an execution on their judgment the petitioners have a levy on all the property described in their mortgage. Under the

Zeller v. Adam.

execution, the sheriff has sold all the property easily movable, and has in his charge and custody the engine, boiler, shafting, belting, fermenting tubs, coolers, and other utensils and appurtenances of the brewing business, which cannot be removed from the premises without serious depreciation thereof, and which can be sold to far better advantage on and in connection with the brewery than away from it. The petitioners, apprehending that question and difficulty may arise as to that property, or some part of it, if the mortgaged premises shall be sold under the *feri facias* in this suit, by the sheriff, without declaration that it is not sold therewith as part thereof, ask that this court will declare that it does not, nor does any part of it belong to or constitute part of the mortgaged premises described in the *feri facias*, and that it give directions to the sheriff accordingly. All the parties interested have, by their counsel, consented that the question whether that property should be sold under *feri facias*, be decided on the petition and the proceedings which have been taken thereon, waiving all objections to the method of procedure.

The proof which has been taken by the parties under the petition, shows that the mortgaged premises, including the property in dispute, were, as before stated, purchased by the firm of Wackenhuth, Adam & Co., from Frederick Kolb (now deceased), at the price of \$130,000; that of this sum they paid \$20,000 in cash, at the time of the conveyance, and \$20,000 more in a mortgage on other real property, and for the balance (\$90,000), they gave him the mortgage now held by the complainant; that Kolb, at the time of the purchase, said that he would make the conveyance of the property in two parts—a deed for the land and a bill of sale for the other property—giving, as his reason for making the bill of sale, that Wackenhuth, Adam & Co. would thus be enabled to repair and remove the property described therein, and if they should get another brewery they would be enabled to remove the property into it. He accordingly gave to the scrivener directions to draw a deed for the land

Zeller v. Adam.

alone, and a bill of sale for the other property, and at the same time gave to him a memorandum of the articles which were to be conveyed by the bill of sale, and handed to him deeds from which to take the description of the land. He instructed him to draw a mortgage of the land, to be described in the deed. The scrivener drew the papers accordingly, and they were so executed and delivered. The articles mentioned in the bill of sale are therein called goods and chattels. They were the following:

“One steam-engine, boiler, shafting and hangings, one malt-mill, one large beer-kettle, one small beer-kettle, one mash-tub, twenty-eight fermenting-tubs, three hundred and sixty hogsheads, four water-receivers, and all appurtenances belonging to the brewery.”

The bill of sale, which is under seal, expresses no consideration, a blank being left for the sum. The scrivener says he cannot say why the consideration was omitted; that it must have been overlooked; and he adds, that he believes that the amount was not given to him at the time, otherwise he would have inserted it in the instrument. The deed of the land expresses the full consideration of \$130,000.

It was within the power of the parties to the transaction, for aught that appears in the case, to deal with the property in question, which was personal in its nature, so as to preserve its character. The proof of the intention so to deal with it is the testimony of Mr. Adam and Herman Ise, the scrivener, which has already been stated in substance, and the evidence afforded by the bill of sale itself. In *Fortman v. Goepper*, 14 *Ohio St.* 558, the plaintiff sold his brewery premises to Hipp & Brandt for \$25,000. He conveyed the real estate by deed therein, describing the premises by metes and bounds. The consideration stated in the deed was \$16,000. By bill of sale he transferred, under general description, for the consideration of \$9,000, as therein expressed, among other articles, the property (a steam-engine, boiler &c.) in controversy in that suit. On the same day Hipp & Brandt executed and delivered to him a

Zeller v. Adam.

mortgage on the real estate for purchase-money. Subsequently they failed in business, and gave to another person a mortgage of the premises conveyed by the deed, and of the property transferred by the bill of sale. The property in dispute was in the brewery, and was used in the business there when the deed and bill of sale were made, and the question was whether it was personal property or part of the realty. It was held, that as between Fortman and the subsequent mortgagee, it was personal, and was not included in the mortgage of the former. The court, too, in that case, it may be remarked, recognized the propriety of a limitation, denying the power of parties to change, by their agreement, the nature of property from real to personal, where, though personal in its nature, it is attached to the realty in such a manner as that it cannot be detached without being destroyed or materially injured, and without the destruction of or material injury to the realty, but assumed that the court below, whose judgment they were reviewing, found that such injury would not ensue in the case in hand.

It appears, in the case now under consideration, that the parties intended to exclude from the complainant's mortgage the steam-engine, boiler, &c., so that the mortgagors might remove them to another place, if they should see fit so to do; and it may be added, that it not only does not appear (indeed, it is not even alleged) that those articles cannot be removed without being destroyed or materially injured, and without material damage to the realty, but it does not appear that they are incorporated with the realty at all.

The declaration and direction prayed for will be made.

Martin v. Cullen.

CATHERINE MARTIN, individually and as administratrix,

v.

EDWARD CULLEN, executor.

A testator died in 1873, leaving a widow, a daughter, and three sons, Thomas, James and Michael. By his will, he devised the use of a lot (No. 183) to his widow, *durante viduitate*, with remainder to Thomas, subject to a legacy of \$1,000 to James, payable in five years after the widow's decease. He gave to James, besides the \$1,000, another legacy of \$4,000, charged on a lot (No. 185) devised to Michael, and payable in five or ten years, at Michael's option. He gave to Michael a lot (No. 185), subject to the legacy mentioned, and, also, a lot (No. 152), and the *residuum* of his estate to be applied to certain religious purposes. James died in 1873, after the testator, his legacies never having been paid. The testator's personal estate being insufficient to pay his debts, including the costs of a litigation to establish the will, directed to be paid out of the estate, lot No. 185 was ordered to be sold for that purpose. The widow, in her own right, and also as administratrix of James, filed a bill for relief against that order.—*Held*, that the debts must be charged upon Thomas's residuary interest in No. 183, and on Michael's interest in Nos. 152 and 185, in the relative proportion which the value of each lot bears to the amount of debts due, and that, in selling Michael's lot, No. 152 must be first resorted to, and if Thomas's remainder does not satisfy his proportion of the debts, the balance must be made out of Michael's property, and *vice versa*; and that the remainder, if any remain, arising from the sales of the several lots, will be subject to the legacies charged on the respective lots.

Bill for relief. On final hearing on bill and answer.

NOTE.—Ordinarily, the lands of a decedent cannot be sold by his representatives, under order of a court, to satisfy any but his own debts existing at the time of his decease. Debts owing, but not due, may be included, *Eaton v. Whitaker*, 6 *Pick.* 465; *Carey v. Dennis*, 13 *Md.* 1; or, payable in installments, some of which are not due, *Haverhill Assn. v. Cronin*, 4 *Allen* 141; or, liability as a stockholder for future calls, *Hamer's Case*, 2 *De G. M. & G.* 366; but a claim on a contingency that may never happen should be excluded, *Harding v. Smith*, 11 *Pick.* 478; and mere voluntary bonds of the decedent intended to be given to a child, but never delivered, *Carey v. Dennis*, 13 *Md.* 1; and the expense of maintaining a lunatic, added to his funeral expenses, *Carter v. Beard*, 10

Martin v. Cullen.

Mr. G. Collins, for complainant.

Mr. J. Garrick, for defendant.

THE CHANCELLOR.

Thomas Martin, deceased, late of Jersey City, by his will, proved November 8th, 1874, gave to his wife his household effects and his cow, and the use, so long as she remained his widow, of his lot, with the house thereon, known as No. 183 Seventh street, in Jersey City, with remainder in fee to his son Thomas, subject to a legacy of \$1,000 to his son James. To James he gave two legacies, one of \$1,000, just mentioned, and another of \$4,000, charging the former on that remainder, and the other on the testator's house and lot No. 185, in Seventh street, in Jersey City, which he gave, by the will, to his son Michael, subject to that legacy. He directed Thomas to pay the legacy of \$1,000 to James in five years from the death of his (the testator's) wife, with interest

Sim. 7; and the representative's expenditures in maintaining the decedent's family after his decease, *Woodruff v. Cook*, 2 *Edw. Ch.* 259; *Pry's Appeal*, 8 *Watts* 253; *Drake v. Lee*, 1 *Mon.* 247. See *Johnson v. Hogan*, 37 *Tex.* 77; *Ingram v. Ingram*, 5 *Heisk.* 541.

As to the effect of a disputed claim, see *Rockwell v. Geery*, 4 *Hun* 606; *Richardson v. Richardson*, 2 *Root* 270; *Newsom v. Newsom*, 3 *Ired. Eq.* 411; also, *Neibert v. Withers, Sm. & Marsh. Ch.* 598.

Taxes on lands assessed before a decedent's death, but not payable until afterwards, may be included, *Brackett v. Tillotson*, 4 *N. H.* 208; *Bowers v. Williamson*, 34 *Miss.* 324; *Henderson v. Whiting*, 56 *Ind.* 131; *Eno v. Roberts*, Kirby 393; *Curry v. Fowler*, 3 *A. K. Marsh.* 504; *Welsh v. Perkins*, 8 *Ohio* 52; *Moore v. Moore*, 22 *La. An.* 226; *Reed's Case*, 4 *Phila.* 375; *Bulfinch v. Benner*, 64 *Me.* 404; *Kingman v. Glover*, 3 *Rich. (S. C.)* 27; *Haydon v. Goode*, 4 *Hen. & Munf.* 460; *Piatt v. St. Clair*, *Wright* 266, 6 *Ohio* 227; *Happgood v. Jennison*, 2 *Vt.* 294. Under the New York statute, *Dugan's Case*, 1 *Tucker* 338; *Griswold v. Griswold*, 4 *Bradf.* 216, 217; *Banks v. Taylor*, 10 *Abb. Pr.* 199; but that the heir or devisee is liable, see *Fairman's Case*, 30 *Conn.* 205; *Stevens v. Evans*, *Burr.* 1152; *Williams v. George*, 3 *Corteis* 343; *Stone v. Wood*, 16 *Ill.* 177; *Phelps v. Funkhouser*, 39 *Ill.* 491; *Rice v. White*, 8 *Ohio* 216; *Schmidt v. Smith*, 57 *Mo.* 135; *Dallam v. Oliver*, 3 *Gill* 445.

As to assessments for benefits or damages, see *Neal v. Knox R. R.*, 61 *Me.* 298; *Durando v. Durando*, 23 *N. Y.* 331; *Boynton v. Peterborough R. R.*, 4 *Cush.* 467; *Upper Appomattox Co. v. Hardings*, 11 *Gratt.* 1; *Cashman*

 Martin v. Cullen.

during that period. He also directed him to secure the payment of the \$1,000 and interest by his bond and a mortgage on the property on which it was so charged. He directed Michael to pay the \$4,000 in five years from his (the testator's) death, without interest; but, provided that if Michael should be unable to pay it within the five years, he should give to James his bond, payable in ten years from the time of the testator's death, with interest from the expiration of the five years, the payment of the bond to be secured by a mortgage on No. 185. He also devised to Michael, in fee, a house and lot known as No. 152 Seventh street, in Jersey City, and gave the residue of his estate to him, to be applied to certain religious purposes.

The admission of the will to probate was resisted by the testator's daughters, and a litigation took place accordingly, in the Hudson orphans court. It resulted in favor of the validity of the will. The court, however, ordered the costs and counsel fees of both sides to be paid out of the estate. The personal estate being insufficient to pay the debts, application was made, by the executor, to the orphans court

v. *Wood*, 6 *Hun* 520; *Goodwin v. Milton*, 5 *Fost.* 458; *Moore v. Boston*, 8 *Cush.* 274; *Welles v. Cowles*, 4 *Conn.* 182; *Seabury v. Bowen*, 3 *Bradf.* 207; *Ross v. Adams*, 4 *Dutch.* 160; *Hawkins's Case*, 3 *Eng. R. & C. Cas.* 505, note; *Moseley v. Boush*, 4 *Rand.* 392.

The rule does not include taxes assessed after the decedent's death, *Wilcox v. Smith*, 26 *Barb.* 316; *Henry v. Horstick*, 9 *Watts* 412; *Gormley's Appeal*, 29 *Pa. St.* 49; *Jackson v. Sassaman*, 29 *Pa. St.* 106; *Lucy v. Lucy*, 55 *N. H.* 9; *Barlow v. St. Nicholas Bank*, 63 *N. Y.* 399; *Walker v. Diehl*, 79 *Ill.* 473. See *State v. White*, 61 *Mo.* 441; *People v. Olvera*, 43 *Cal.* 492; *Putnam v. Russell*, 17 *Vt.* 54; *Watt v. White*, 46 *Tex.* 388; *Williams v. Holden*, 4 *Wend.* 223.

The costs of a lawsuit brought by the representative, are not within the rule, *Dean v. Dean*, 3 *Mass.* 258; *Sanford v. Granger*, 12 *Barb.* 392; *Wood v. Byington*, 2 *Barb. Ch.* 387.

Nor the costs and expenses of administration, *Drinkwater v. Drinkwater*, 4 *Mass.* 354; *Gross v. Howard*, 52 *Me.* 192, 196; *Farrar v. Dean*, 24 *Mo.* 16; *Cornwall's Case*, 1 *Tuck.* 250; *Fitzgerald v. Glancy*, 49 *Ill.* 465; *Walworth v. Abel*, 52 *Pa. St.* 370; *Fitch v. Witbeck*, 2 *Barb. Ch.* 161. See *Brazer v. Dean*, 15 *Mass.* 183; *Dunning v. Driver*, 25 *Ind.* 269; *Coblaugh's Appeal*, 24 *Pa. St.* 143; *Bentz's Case*, 36 *Cal.* 687; and although necessary expenses may not be embraced in a petition with debts (*Den v. Hammel*, 3 *Harr.* 73), yet until reversed for that cause, the order is valid, *O'Hanlin v. Den*, *Spencer*, 33, 50.

Martin v. Cullen.

for an order directing the sale of land to pay debts, which was granted: the court ordering that the premises No. 185 Seventh street, devised to Michael, should be sold for the purpose. James died in 1873, after the death of the testator. He died intestate, and was never married. Neither of the legacies to him has been paid. Letters of administration of his estate were granted to his mother, the testator's widow. The property ordered to be sold is that on which his legacy of \$4,000 is charged.

As administratrix of his estate, and in her own right as one of his next of kin, his mother filed her bill to stay the sale, with a view to obtaining equitable relief in this court.

The executors and Michael have answered. The other defendants have not.

After the testator's death, Michael, as devisee, took possession of the property ordered to be sold, and has ever since retained it. He is liable to pay the legacy of \$4,000 charged thereon. The amount to be raised for the payment of debts is about \$1,100 and interest, and it is to be raised out of the real estate, the three lots, one of which,

Commissions are not included, *Williams v. Williams*, 8 *Ohio St.* 300; *Holman v. Bennett*, 44 *Miss.* 322; *Newsom v. Newsom*, 3 *Ired. Eq.* 411. See *Drake v. Lee*, 1 *Mon.* 247.

The representative, in case of a just advancement, may be subrogated to the creditor's rights, *Liddel v. McVickar*, 6 *Hal.* 44; *Williams v. Williams*, 2 *Dev. Eq.* 69; *Sanders v. Sanders*, *Id.* 262; *Ball v. Miller*, 17 *How. Pr.* 300; and entitled to re-imbursement, *Pea v. Waggoner*, 5 *Hayw.* 242; *Ingram v. Ingram*, 5 *Heisk.* 541; *Smith v. Hoskins*, 7 *J. J. Marsh.* 502; *Collinson v. Owens*, 6 *Gill & Johns.* 4; *Lindsay v. Lindsay*, 1 *Desauss.* 150; but not if the debts were barred by the statute of limitations when paid by him, *Gilchrist v. Rea*, 9 *Paige* 66; *Mooers v. White*, 6 *Johns. Ch.* 360; *Pry's Appeal*, 8 *Watts* 253; *Hamilton v. Newman*, 10 *Humph.* 557; or the assets have been lost by his negligence, *Turner v. Ellis*, 24 *Miss.* 173; *Stuart v. Kissam*, 2 *Barb.* 493; *aliter*, where he has been blameless, *Evans v. Fisher*, 40 *Miss.* 643; *Stigler v. Porter*, 42 *Miss.* 449; *Ingram v. Ingram*, 5 *Heisk.* 541.

That the judgment of the creditor is recovered after a distribution of the estate has been made, cannot affect his claim, *Faran v. Robinson*, 17 *Ohio St.* 242; *Jones v. Wightman*, 2 *Hill (S. C.)* 579; *Bland v. Hartsoe*, 69 *N. C.* 204; *Hall v. Partridge*, 10 *How. Pr.* 188.

The purchase-money paid to an administrator cannot be recovered of the heir, at whose instance the sale is set aside, *Nowler v. Coit*, 1 *Ohio* 236; *Dorman v. Tost*, 13 *Ill.* 127.—REP.

Martin v. Cullen.

No. 183, is devised to the widow so long as she continues to be the testator's widow, with remainder in fee to Thomas, subject, as to the remainder, to the legacy of \$1,000 to James; and the other two, Nos. 152 and 185, are devised to Michael, in fee, the latter subject to the legacy of \$4,000 to James. The remainder given to Thomas, and the land devised to Michael, are both liable to pay the debts, and are liable, after payment of the debts, to pay the legacies to James, respectively charged thereon. The devise to the widow was undoubtedly in lieu of dower in the real estate of her husband. Her estate in No. 183, therefore, ought to be protected. A proper proportion of the debts should be charged on Thomas's interest in the one property, and Michael's in the others; and each should, if necessary, be sold to raise its proportion.

Of Michael's property, No. 152 will be first sold to raise his proportion of the debts (he being liable to pay the legacy of \$4,000), and if that property should not bring enough to pay his proportion, then No. 158 should be sold. If Thomas's remainder does not bring enough to pay his proportion of the debts the balance must be made out of Michael's property. Thomas's remainder will also be liable to raise any part of the debts besides his proportion which Michael's property shall fail to pay. The residue of the proceeds of the sale of Thomas's remainder, after paying so much of the debts as required hereby, will be subject to the legacy charged thereon, and in like manner the residue of the proceeds of No. 185 (Michael's property), if it be sold, will, after payment of so much of the debts as is hereby made payable therefrom, be subject to the legacy of \$4,000.

There will be a reference to a master, to ascertain and report the proportions.

Weise v. Welsh.

EDWARD WEISE and wife and others

v.

DAVID W. WELSH and wife.

By a will proved in 1846, a devise of certain limestone quarries was made to testator's daughter, for life, with remainder to her four daughters in fee. Under a lease from the life-tenant, given in January, 1876, for the term of three years, the husband of one of her daughters went into possession of and worked the quarries. The life-tenant died in September, 1877. On a bill for a partition of the quarries, filed by three of the daughters and their husbands against the fourth,—*Held*,

(1) That the husband of the fourth daughter (who claimed possession under the lease, notwithstanding the life-tenant's death) was a proper party.

(2) That, by virtue of his interest as husband, he might be enjoined from wasting the premises, as if he, and not his wife, were a tenant in common.

(3) That sufficient grounds for the appointment of a receiver existed.

(4) That an account against such husband could not be maintained in that suit.

Bill for partition. On general demurrer.*Mr. G. A. Allen*, for demurrants.*Messrs. Voorhees & Large*, for complainants.

THE CHANCELLOR.

This suit is brought by Edward Weise, James S. Weise and James Sliker and their wives, against David W. Welsh and his wife, for partition of certain land in Hunterdon

NOTE.—Although a dowress had, at common law, no such interest in lands as entitled her to partition, the rule was otherwise as to a tenant by the curtesy initiate or consummate. *Riker v. Darke*, 4 *Elw. Ch.* 668; *Walker v. Diworth*, 2 *Dall.* 257; *Darlington's Case*, 13 *Pa. St.* 430; *Otley v. McAlpine*, 2 *Gratt.* 340. See *Hartmann v. Hartmann*, 59 *Ill.* 103.

Weise v. Welsh.

county, and other auxiliary relief. The bill prays that a partition may be made; that Welsh, who claims the property under a lease which the complainants insist expired on or about the 20th of September, 1877, and is removing limestone therefrom, may be enjoined from committing waste of the premises; that the lease may be declared to be void; that in view of the fact that Welsh has excluded the complainants from possession and enjoyment of their interests in the property, and that it is important to the interests of all parties concerned in the property, that the limestone quarries be worked and the stone disposed of, since the existing market, which is an advantageous one, will be lost if the supply ceases, a receiver may be appointed to work the quarries and dispose of the stone in that market; that Welsh may, in this suit, account and pay for his use of the property since the expiration of his lease, and, if he fails to do so, that the amount due from him therefor may be deducted from his wife's share of the proceeds of the property, in case of sale, for the benefit of all the parties interested in the property; and for general relief. The female complainants are, with the female defendant, the owners of the property in fee. Their grandfather, by his will, which was proved in 1846, gave to their mother, who died on or about the 20th of September, 1877, an estate for her life, in the property, with remainder in fee to them. She, by lease dated on the 5th of January, 1876, demised the property to the defendant, David W. Welsh, for the term of three years from the 1st of April then next, at an annual rent of \$300. After her death, he continued in possession, claiming, as he still does, that his lease is valid; and, under that claim and his possession of the property, he has been, and still was when the

If the title of lands was in the wife, her husband could join with her as complainant for a partition in equity. *Scars v. Hyer*, 1 *Paige* 483; *Rosekrans v. White*, 7 *Lans.* 486; *Ripple v. Gilborn*, 8 *How. Pr.* 456; *Spring v. Sandford*, 7 *Paige* 550; *Eckert v. Yous*, 2 *Rawle* 136. See *Brownson v. Gifford*, 8 *How. Pr.* 389; *Marston v. Ward*, 35 *Tex.* 797.

Weise v. Welsh.

suit was begun, removing large quantities of the limestone, which he has sold for his own benefit, refusing to account to the female complainants who are the owners in fee of three-fourths of the property (his wife owning the remaining fourth), for the proceeds of such sales or any part thereof, and he is entirely insolvent. After the death of the life-tenant, and in October, 1877, the complainants empowered a person to take possession of the property in their behalf, and, as their agent, to work the quarries for the female complainants. Welsh gave possession to him, but in a few days thereafter prevented him and his workmen, by arrests in suits for trespass, and by threats and intimidation, from working the quarries, and thereupon began again to work them himself, on his own account, for his own benefit, and continued to do so up to the commencement of this suit.

Welsh demurs to the bill on the ground of want of equity; and that he has no right, title or interest in the property nor any possession of it which would prevent or interfere with a partition; and that the bill seeks to set aside his lease, and, by means of a receiver, to eject him from possession, and prays an account from and an injunction against him; and that the bill is multifarious, because it joins distinct and separate matters together which ought not to be united in the same bill.

That Welsh is a proper party to the bill, under the circumstances, cannot be doubted. The court cannot shut its eyes to the fact that the relation of husband and wife, with its practical community of interest, exists between him and

But if not made a party, she would not be bound. *Zimmerman v. Rapp*, 20 Wend. 100. See *Lee v. Lindell*, 22 Mo. 202.

In a suit for partition of lands against a married woman, her husband must be joined, or his rights are not affected. *Pillsbury v. Dugan*, 9 Ohio 117. See *Falls v. Hawthorn*, 30 Ind. 444; *Disbrow v. Folger*, 5 Abb. Pr. 53, 54.

As to the proper mode of allotment of a wife's share of realty after a partition, as between her and her husband, and its effect, see *Hallenbeck v. Bradt*, 2 Paige 316; *Cost v. Rose*, 17 Ill. 276; *Campbell v. Wallace*, 12 N. H. 362; *Ferguson v. Tweedy*, 56 Barb. 168; *Millett v. Millett*, 12 Jur.

Weise v. Welsh.

his co-defendant. He stands in a different position, by reason of such relation, from that which would be occupied by a mere stranger. He claims, indeed, under a lease from the life-tenant; but it is void, it expired with the lessor. Under pretence of its validity, he was, when the bill was filed, not only committing waste of the premises, but refused to account, and was insolvent. His claim of lease, although the lease was void, beclouded the title and would not fail to affect the price which the property would bring, if a sale should be ordered. A tenant in common may, in a suit for partition, be enjoined from committing waste. *Coffin v. Loper*, 10 C. E. Gr. 483. If the waste be committed by the husband of the tenant, there is surely enough in the practical community, if not actual identity of interest, between his wife and him, growing out of their marriage relation, to warrant the complainants in joining him in the bill with his wife, instead of instituting a separate suit against him, and so treating him as an entire stranger. And so, too, in regard to the lease. The husband of one of the tenants in common beclouds the title with a lease, under which, though it is void, he asserts a right to possession of the property until the end of the term (with the right to commit waste), to the exclusion of all the other tenants in common. To drive the complainants to a separate action to remove this cloud would be to encourage multiplicity of suits. The like considerations apply to the objections urged against the prayer for a receiver. A receiver may be appointed in a suit for partition where the circumstances of the case require

649; *Noble v. Cromwell*, 26 Barb. 475; *Lippincott's Case*, 3 Hal. 88; *Thompson v. Peebles*, 6 Dana 387, 394; 1 *Bish. on Mar. Wom.* §§ 607, 608; *Stoolfoos v. Jenkins*, 8 Serg. & R. 167; *Lancaster Bank v. Stauffer*, 10 Pa. St. 398.

As to the effect of the marriage of a party, pending the partition, see *Jackson v. Edwards*, 7 Paige 386; *De Louis v. Sage*, 13 Iowa 146; *Finch v. Jackson*, 30 Ind. 387.

Mere acquiescence by a husband cannot bind his wife or her heirs in a parol partition of her lands. *Bradstreet v. Pratt*, 17 Wend. 44; *Heavener v. Godfrey*, 3 W. Va. 426.—REP.

De Greiff v. Wilson.

it, where it is necessary, in order to protect the complainants' right to the enjoyment of the property. *Low v. Holmes*, 2 C. E. Gr. 148; *High on Receivers*, § 607. Here the owners of three-fourths of the property are absolutely excluded from any participation in the use or enjoyment of it; not, indeed, by the other tenant in common, but by her husband; and he insists that he has a right to demand that he shall be dealt with in the premises as if he were a mere stranger. If the act complained of were the act of his wife, there could be no doubt as to the power of the court to grant the relief in this suit. The unity of husband and wife will be recognized under such circumstances as this case presents, so far as the preventive remedy is concerned.

As to the account sought against Welsh, the bill cannot be maintained, but it is good against him in every other respect.

The demurrer is too extensive. It will be overruled, with costs.

ANTHONY DE GREIFF

v.

SARAH B. WILSON and another.

1. A person who was a member of a partnership when a mortgage was given to the firm (but in the name of one partner only), and also when advances were afterwards made thereon by the firm, and when the bill was filed, ought to be a party to a suit for its foreclosure.

2. A judgment recovered against a principal alone is, as a general rule, as against the surety, evidence of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment.

Bill to foreclose. On final hearing on pleadings and proofs.

De Greiff v. Wilson.

Mr. J. A. Cobb, for complainants.

Mr. W. J. Magie, for defendants.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage on land in the city of Elizabeth, dated November 22d, 1875, and given by the defendants to the complainant to secure the payment of \$20,000, in one year from its date, with interest at seven per cent. per annum, payable half-yearly. It was given, as security, to the firm of A. De Greiff & Co. (composed of the complainant and Charles J. Triacca), against loss upon advances to be made, after the date of the mortgage, by that firm to the firm of Bolton, Hitchcock & Wilson, under an agreement between those firms. The latter firm was composed of Clifton Bolton, William Hitchcock and Dunlop Wilson.

The bill is an ordinary bill to foreclose. The answer and proofs disclose the true character of the mortgage. The firm of Bolton, Hitchcock & Wilson has been dissolved. Charles J. Triacca, who is one of the members of the firm of A. De Greiff & Co., and was such when the mortgage was taken and the advances made thereunder, ought to have been made a party to this suit. *Jones on Mortgages* § 1379. And it would have been better pleading if the bill had set forth the true character of the mortgage, and of the claim made under it.

But, apart from these considerations, the proof of indebtedness is not sufficient to warrant a decree in favor of the complainant. That the bond and mortgage were made, is not disputed; but that anything is due upon them, is denied. The complainant relies, for proof of the indebtedness, upon a judgment recovered by A. De Greiff & Co. against Bolton, Hitchcock & Wilson, in the court of common pleas for the city and county of New York, on the 27th of November, 1876, for \$19,519.25, and an admission, in writing, of

De Greiff v. Wilson.

the amount due, made by Bolton, on the 26th of October, 1877, after the firm of Bolton, Hitchcock & Wilson was dissolved, after this suit was brought, and, indeed, after he had been sworn and examined as a witness for the complainant therein. The judgment is not evidence of the indebtedness against the defendants. Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may have undertaken to be responsible for the result of a suit, or where he is made privy to the suit by notice, and the opportunity is given to him to defend it, a judgment against the principal alone is, as a general rule, evidence of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment. *Brandt on Suretyship* § 524.

In this case there was no appearance by or in behalf of Hitchcock, and the appearance in behalf of the other members of the firm, Bolton and Wilson, was by attorneys, selected by the complainant himself, and whom, at the request of the complainant, they authorized to appear for them in the suit, merely in order that a receiver might be obtained therein. They appear to have had no intention that the attorneys should represent them further in the cause. Dunlop Wilson testifies as follows on that subject: "Mr. De Greiff had made application to have a receiver appointed; he came to me and asked me if I had retained a lawyer to appear for me in that case; I told him that I had not yet done so; he then said that he wished to spare me all the expense possible; that he had no quarrel with me, and did not wish to have any; that he entertained feelings of friendship for me; he said that this receiver business was merely a matter of form, his object being to get rid of Mr. Hitchcock, with whom he had had a quarrel, and said that if I had no objections he would have a young friend of Mr. Ascher's (Mr. Ascher was his attorney) appear for Bolton and me in the suit, and allow the receiver to be appointed; I went to the

De Greiff *v.* Wilson.

office of Rubenstein & Ascher with Messrs. De Greiff and Bolton that same day, or immediately after this conversation; there, it was suggested that Mr. De Greiff should be appointed receiver; he stated that the idea was a good one, as it would save much expense; we then went into the office of Jacobs & Koch, and, at De Greiff's request, gave that firm written authority to appear for us in that suit; at that time I supposed it was an authority to appear for us in that suit for the receiver; I am now aware that they proceeded and took judgment against our firm; I had no notice of it whatever until some weeks after it was obtained; I found it out accidentally; I am taking steps to open the judgment; I have made an application to have it opened; I have, as I believe, a defence to the action." Jacobs & Koch were the attorneys who appeared for Bolton and Wilson in the judgment.

It appears, from Bolton's testimony, that he knew nothing of the taking of the judgment. It appears, also, that there was, in fact, pending, at the time when Wilson testified, an application to open the judgment, and that both Bolton and he made the affidavits on which it was founded. The result of the application does not appear.

A judgment so obtained could not be held to be binding upon the sureties here.

The complainant insists that the indebtedness, and the amount of it, are established by the admission of Bolton, before referred to, made on the 26th of October, 1877. It is in the form of a letter to A. De Greiff & Co., and is as follows: "I have your accounts current between yourselves and the former firm of Bolton, Hitchcock & Co., showing balance due you of \$19,519.25, over date of November 27th, 1876, and find them correct, to the best of my knowledge." It is very obvious, from the testimony of Bolton on the subject, that this admission is of no value whatever. He says: "There are no books or accounts which would disclose the indebtedness of the firm (Bolton, Hitchcock & Wilson) to De Greiff & Co., except the books of De Greiff & Co. I

De Greiff v. Wilson.

was reading from the accounts current when I stated the amounts that appeared to be due De Greiff & Co. I have not compared the account current with the account in the book; I have no memorandum with which I have compared it; when I say there appear to be due those amounts, I mean nothing more than that it is so stated in the accounts furnished by them; I have no knowledge, except a general knowledge." Again, he says: "There is one disputed account which has never appeared to our credit; perhaps it has never been settled; I cannot say; it is the account of Montesny & Chemer, a firm in Lyons, France." It appears, by his testimony, that this item amounts to between \$800 and \$900. Again, he says, that the account current in this case is a *resume* of the books of De Greiff & Co., and Bolton, Hitchcock & Wilson; that he never asked to be permitted to examine the books of De Greiff & Co., and that he would consider it an insult to do so. He further says that it was the custom of his firm to reply, in writing, as to the correctness of the accounts current, but he himself generally had nothing to do with it. It is a very significant fact that this witness, who thus certified to the correctness of the amount of the judgment, in a short time afterwards joined Dunlop Wilson in the application to open the judgment to let in a defence.

It appears that, in July, 1876, some money was paid by De Greiff & Co., on account of Bolton, Hitchcock & Wilson, on the order of the defendant, Mrs. Wilson, but whether anything is due in respect of it, does not appear.

It would be in accordance with the practice to dismiss this bill, with costs, without prejudice to the right to bring a new suit; but the same end will be better attained by directing that the cause stand over for further proofs, on payment by the complainant of the defendants' costs of the proceedings subsequent to the answer, with leave to the complainant to amend by making Mr. Triacca a co-complainant; and it will be so ordered.

Coe *v.* New Jersey Midland Railway Co.

GEORGE S. COE and others

v.

THE NEW JERSEY MIDLAND RAILWAY COMPANY and others.

A board of public works of a city is not justified in refusing to supply water for the use of the engines, etc. of a railroad being operated by a receiver under the direction of the court, on the ground that certain water rents, which were due when the railroad was declared insolvent, are unpaid.

Petition of receivers for injunction to compel the Board of Public Works of Jersey City, to furnish water at the engine-house of the New Jersey Midland Railway company there, for use in the locomotive engines, &c., of the company.

On petition and answer, and order to show cause why the injunction should not be granted.

Mr. W. P. Douglass, for the petitioners.

Mr. L. Abbett, for the city.

THE CHANCELLOR.

The question presented by the petition and answer is, whether the mayor and aldermen of Jersey City can lawfully be required to furnish, for due compensation, water from the public supply for use in the locomotive engines of the railroad company.

On behalf of the city, it is insisted that it is at liberty to impose, as condition of furnishing the water, the terms that certain water rents which were due from the company to the city when the former was declared by this court to be insolvent, shall first be paid. For all the water furnished to the receivers full payment has been made. The city does not allege that any objection whatever to furnishing the

Coe v. New Jersey Midland Railway Co.

water exists, except the non-payment of the water rents before mentioned, due, as alleged, from the company when it was declared insolvent. The only question, therefore, is, whether the refusal, based on that ground alone, is reasonable.

In *Dayton v. Quigley*, 2 *Stew.* 77, it was held, that the action of the officers of a municipality, charged with the control and management of the public water supply of the city, in refusing to supply water to a dwelling-house there, except on condition of payment of a claim of the city upon the tenant thereof for water furnished to him at another place, not the property of the landlord, was unreasonable. The rule laid down in that case is applicable, in full force, to this. The receivers are operating the road under the direction of this court, as well for the benefit of the public as for the advantage of the property itself. The use of the water is necessary to the discharge of the duty imposed upon them. The city treats the subject as if the receivers were merely the representatives of the company, or of those who hold encumbrances on the property, but that view is inadequate.

It is this court with which the city is in controversy, and, under the circumstances, it is unreasonable for it to refuse to furnish the water, except on the conditions which it seeks to impose. The court will take notice, on due application, of any claim of lien for water rents due to the city from the company, and will allow the city the benefit of any lien which it may have, by law, for the collection thereof, controlling its action in the premises, however, as equity may demand, but securing to it its full rights as far as practicable.

The order to show cause will be made absolute, and the injunction will be granted.

Farmers National Bank of New Jersey v. Lloyd.

THE FARMERS NATIONAL BANK OF NEW JERSEY, AT
MOUNT HOLLY,

v.

JAMES LLOYD and others.

A prior judgment creditor was made a party to a foreclosure bill, but, his judgment having been paid by a surety for the debt on which the judgment was recovered, he entered no appearance, and there was no proof before the master as to the amount due on the judgment, nor any direction in the final decree as to its payment.—*Held*, that, as to the surety, the priority and lien of the judgment were unaffected by the proceedings, and a petition by him to be made a party, in order to protect his rights, was dismissed.

Bill to foreclose. On motion of encumbrancer to be admitted as a party defendant. On petition.

Mr. C. Ewan Merritt, for the motion.

Mr. J. L. N. Stratton, *contra*.

THE CHANCELLOR.

William S. Coleman applies to be made a defendant in this suit (which is for foreclosure and sale of mortgaged premises), with a view to protecting his interest under a judgment recovered by Daniel Zelley against him and Elijah T. Smith, who was the owner of the property at the time when the judgment was recovered, but subsequently sold and conveyed it to the complainants' mortgagor who afterwards gave their mortgage. The judgment, therefore, is prior to that mortgage. The bill does not allege that it has been paid or satisfied, nor does it attack it or call it in question in any way or deny or question its priority over the complainants' mortgage.

By the petition it is alleged that the petitioner was merely surety for Smith in the debt for which the judgment was recovered, and that he, in order to remove the encumbrance

Farmers National Bank of New Jersey v. Lloyd.

of it from his property, paid the amount of it to Zelley, the plaintiff therein, but that it was not satisfied aforesaid; and he claims to be entitled to subrogation to the rights which Zelley then had under the judgment, and to be entitled to have recourse to the lien of the judgment on the mortgaged premises for re-imbursements. Zelley was made a defendant in the suit, but did not appear. As before stated, he had received the amount of the judgment from the petitioner, and he had, therefore, no interest in the litigation.

The complainants, in filing their bill, chose to make all prior as well as all subsequent encumbrancers parties.

Zelley not having appeared or given any attention to the suit, there was no proof of his judgment in the cause. The final decree directs that the mortgaged premises be sold to pay, in the first place, the amount of a mortgage, given by Smith, on the premises, and which is prior to the encumbrance of the complainants' mortgage, and to the judgment recovered by Zelley; and, in the next place, to pay the complainants' mortgage, and then to pay other mortgages subsequent thereto.

The petitioner apprehends that his rights, under the Zelley judgment, will be affected by a sale of the mortgaged premises under the decree in this cause. If that were true, it would be sufficient reason for admitting him as a party. But it is not true. Zelley, as the holder of the judgment, stands unaffected by the decree, notwithstanding his default, and so does the lien of the judgment on the mortgaged premises, and the rights or equities of the petitioner under it. A prior encumbrancer whose lien is not assailed in the bill of complaint, is not a necessary party to a suit for foreclosure, and if he be made a party, and does not choose to come in with his encumbrance, his rights are wholly unaffected by the proceedings. *Hendry v. Quinan*, 4 Hal. Ch. 534; *Hudnit v. Nash*, 1 C. E. Gr. 550; *Wilkins v. Kirkbride*, 12 C. E. Gr. 93; *Frost v. Koon*, 30 N. Y. 428; *Jones on Mortgages* § 1439.

The petition will be dismissed.

Howard v. Francis.

GEORGE E. P. HOWARD and others, executors, &c.,

v.

MARY ANN FRANCIS and others.

1. Where a testator leaves real estate, of which his widow is dowerable, a legacy given to her in lieu of her dower, does not, as between legatees, abate on deficiency of assets but is entitled to preference over other gifts merely voluntary.

2.—(1) Interest on a legacy given to a widow in lieu of dower is to be computed from one year after the testator's death; (2) interest on a legacy to a minor child, from the date of testator's death; (3) interest on a legacy to an adult child, from one year after such death; (4) on a legacy to grandchildren, from one year after such death.

3. Executors vested with absolute power to sell real estate, are authorized to do all that is necessary in the way of insurance, superintendence, repairs and taxes, to preserve the property until sale.

Bill for construction of will and directions. On bill, answers and consent of counsel.

Messrs. G. E. P. Howard and W. H. Francis, in pro. pers.

Mr. F. A. Johnson, for Mary Ann Francis.

THE CHANCELLOR.

Ebenezer Francis, late of the city of Newark, deceased, by his will, after directing payment of his debts and funeral expenses, gave and devised to his wife, Mary Ann, during her widowhood, the house No. 302 Washington street, in Newark, where he, at the date of the will (July 27th, 1876), resided, with remainder in fee, on her death or remarriage, to his daughter Mary McLean, and providing that, if his daughter Mary McLean should predecease his wife during the widowhood of the latter, the property should go to the latter in fee. He then gave all his personal estate, except such as belonged to his business firm, to his wife as her

Howard v. Francis.

absolute property. He then gave to his executors \$10,000, to be held by them in trust for his wife and his daughter Mary McLean, the income thereof to be paid to his wife during her life, and that of his daughter Mary McLean, for their support and maintenance; on the death or remarriage of his wife, in the life-time of his daughter Mary McLean, the principal sum and any unexpended income remaining in the hands of the executors, to be paid over to his daughter Mary McLean, if then of full age, but if not, then the executors to continue to hold the principal sum in trust for her until she should attain to her majority, they to expend so much of the income for her support as might be necessary, and on her attaining to her majority to pay over to her the principal sum, with any of the income thereof remaining in their hands; but if she should die during the widowhood of his wife, then the principal sum and any income thereof remaining at her death in the hands of the executors, to be paid over by them to his wife. He then gave to his executors \$10,000, to be held by them in trust for his daughter Emma and her two children, the income to be paid to her in half-yearly payments, for the support and maintenance of her and her children during her life, and provided that, on her death, the principal sum and any unexpended income in the hands of the executors be paid in equal shares to her children, if then of age, and both survive their mother, but if only one of them survives the mother, the whole to go to that one; and if the children, or either of them, should then be under age, the executors to continue to hold the principal sum, if both are under age, or the share of the one under age, if only one be under age, and receive the income, expending so much as necessary for support of such minor children or child, and pay over the principal sum, with the unexpended income in their hands, to the children or child, on their or his or her attaining to full age. He further provided, that if his daughter survive both children the principal sum and unexpended income in the hands of the executors go to his daughter Emma, and if her husband

Howard v. Francis.

survive her and her children the principal and unexpended income to go to him. He then gave to his executors \$5,000 on a similar trust, for his son Ebenezer and his (the son's) wife and child. And he gave the residue of his estate in augmentation of the several sums so given in trust for his wife and his daughter Mary Ann, his daughter Emma and her children and husband, and his son Ebenezer and his wife and child. He then declared that neither the house in Washington street, nor the personal property given to his wife, was in any case to be subject to or charged with the payment or discharge of the legacies before given, or his debts; and that the provision in his will for his wife was in lieu of her dower in his estate. He then gave his executors power to sell and convey his real estate, and authorized and empowered them to use their own discretion in the settling up and adjusting of his interest in and in connection with his partnership business, both as to time and manner, having in view the welfare of the estate, and the good of those who, under the provisions of his will, he desired should receive the benefit of the results of his long-continued business life.

The testator died July 27th, 1876. He left but little personal estate, except that which belonged to his copartnership, and no real estate, except the house in Washington street, devised to his wife, and his interest in his factory premises, which is a large and valuable property in Newark. Out of the personal estate received from the copartnership the executors have paid his funeral expenses, certain expenses of the administration, and his debts and taxes upon his real estate; and they have also made payments therefrom for the support and maintenance of the widow and her minor child, the testator's daughter, Mary McLean. They have in hand, including money invested (some \$8,000), about \$11,783.34. They will realize no more from the estate until they sell the factory premises, for which, owing to the depressed condition of the real estate market, it is impossible now to find a purchaser at an adequate price, or to sell it without very great

Howard v. Francis.

sacrifice. In the amount received by them from the partnership business there was included some interest money. They have received some rent from the factory property (there are some small dwelling-houses on it besides the factory buildings), and will probably continue to receive rents from it. There is a mortgage of \$5,000 upon those premises, the interest of which must be provided for, as well as insurance upon the buildings and taxes, and the costs of superintending and taking care of the property, a large part of which is not occupied.

The executors ask instructions as to their duty in the following respects: Whether, under the circumstances, they should first invest the legacy of \$10,000, given to the widow, and whether the investments already made should be held on account thereof, or whether those investments are to be held on account of the legacies to the widow and the testator's daughter Emma and his son, respectively; if the legacy of \$10,000 to the widow is entitled to priority, from what time it draws interest, and whether the executors should pay the expenses of the factory premises before mentioned, out of the rents of that property.

The mere fact that the legacy of \$10,000 in trust for the widow and her daughter is in the will given prior, so far as respects the order in which the gifts are stated, to the other legacies given in trust, would not, of itself, avail to give priority in payment to it, or to exempt it from abatement if there should be deficiency of assets to pay all the legacies in full. *Titus's Adm'r v. Titus*, 11 C. E. Gr. 111. But the legacies given to the widow are given in lieu of dower, and such legacies do not, where the testator, as in this case, leaves real estate of which the legatee is dowable, abate on deficiency of assets. 2 Redf. on Wills 551; 1 Roper on Leg. 431. Such legacies are held to be given for a valuable consideration, the relinquishment of a valuable right or interest, and not merely of bounty, and, therefore, they are regarded in the light of purchase-money, for such right or interest is held to be, and for that reason entitled to preference over

Howard v. Francis.

gifts merely voluntary. And, as the testator is the best judge of the price at which he is desirous of purchasing any such right or interest, the right of preference is not affected by the consideration that the bequest happens to exceed the value of it. 1 *Roper on Leg.* 433.

There is a class of cases in which it is held that a legacy given to a widow, in lieu of her dower, is, if no other means are provided for her support, entitled to interest from the testator's death, because it is given in lieu of that from which she might have derived immediate profit, and is in the nature of provision for the payment of a debt. *Williamson v. Williamson*, 6 *Paige* 298; *Hepburn v. Hepburn*, 2 *Bradf.* 74; *Parkinson v. Parkinson*, *Id.* 79; *Pollard v. Pollard*, 1 *Allen* 490; 2 *Wms. on Ex'rs* 1425 n.; *Irly v. McCrae*, 4 *Desauss.* 422, 423. In this court, however, in *Church at Acquackanonk v. Ex'rs of Ackerman*, *Sax.* 40, 43, the consideration that a legacy was given in lieu of dower, appears to have been regarded as of no consequence in determining the time from which it should bear interest, and it was held that the legacy in that case, which was given in lieu of dower, bore interest only according to the common rule, notwithstanding the fact that the legatee was, at the testator's death, dowable of lands of which he died seized. The testator's minor child, who has no other means of support, is entitled to interest on her legacy from the death of the testator. 2 *Roper on Leg.* 1257; *Cox v. Corkendale*, 2 *Beas.* 138. But the fact that the legacy is given for support, will not, of itself, entitle the legatee, though a child of the testator, to interest from the death of the testator, if the legatee be an adult. Nor are grandchildren entitled. 2 *Roper on Leg.* 1271, 1272; 2 *Wms. on Ex'rs* 1424, 1425; *Sullivan v. Winthrop*, 1 *Sumn.* 1, 15; *Hennion's Ex'r v. Jacobus*, 12 *C. E. Gr.* 28. Nor is a wife, in the absence of express provision, entitled to the benefit of the exception, except where the legacy is in lieu of dower, and it is held that that fact entitles her to it. Therefore, while the testator's minor daughter is entitled to her share of the interest on the \$10,000 legacy from his

Stockman v. Wallis.

death, his daughter Emma, and his son, who are adults, are not, but are entitled to interest only after one year from his death; and so, too, as to their children. The minor daughter is entitled to \$300 for her share of the interest for the year immediately succeeding the testator's death. After that her mother is entitled to the whole interest for the support of both.

The legacies to Emma and Ebenezer will, in case of deficiency of assets, abate proportionably. *Titus's adm'r v. Titus*, 11 C. E. Gr. 111.

The executors are bound to take care of the factory property until it shall be sold, and it is their duty to do whatever is necessary in the premises to preserve the property; and they may pay the expenses of superintendence, necessary repairs, insurance and taxes, out of the rents.

It results from the foregoing opinion that the executors are bound to hold \$10,000 of the investments for the legacy given for the benefit of the widow and her child, the interest of which is payable to her for the maintenance and support of both; that they will be allowed \$300 for the payment to the widow of that sum for support of her daughter for the year immediately succeeding the testator's death; from the expiration of that period the widow is entitled to the whole of the interest; that the rest of the funds invested will be held for the benefit of Emma and Ebenezer proportionably, and the executors will, out of the rents of the factory, pay the necessary expenses of insurance, superintendence, repairs and taxes.

WILLIAM STOCKMAN

v.

HAMILTON WALLIS and others.

That an owner of part of the premises covered by a mortgage, receives the rents therefrom and refuses to apply them on account of

Chetwood v. Coffin.

the interest due on such mortgage, the taxes thereon being also unpaid, and there being no personal security, and the premises being insufficient, justifies the appointment of a receiver pending foreclosure.

Bill to foreclose. Motion for receiver.

Mr. Samuel Morrow, Jr., for the motion.

Mr. Flavel McGee, contra.

THE CHANCELLOR.

The application for a receiver in this case is resisted on the ground that the reasons presented are insufficient. There is no personal security, the mortgaged premises are insufficient and the taxes and the interest on the mortgages are unpaid. One of the defendants is the owner of part of the property. He has let it and is taking the rents to his own use. The fact that he thus misapplies the rents, as far as the interest is concerned, is enough (to say nothing of the taxes) to justify the court in appointing a receiver. *Cortelyou v. Hathaway*, 3 Stock. 39; *Chetwood v. Coffin*, 3 Stew. 408.

A receiver will be appointed.

GEORGE R. CHETWOOD

v.

CARRIE C. COFFIN and others.

That an owner of part of the premises covered by a mortgage receives the rents therefrom, and refuses to apply them on account of the interest due on such mortgage, and there being no personal security, and the premises being insufficient, justifies the appointment of a receiver pending foreclosure, although the unpaid taxes on the premises may be a lien subsequent to the mortgage.

Bill for foreclosure. Motion for receiver.

Green v. Green.

Mr. John Chetwood, for the motion.

Mr. W. J. Magie, *contra*.

THE CHANCELLOR.

The facts stated in the petition are admitted. It is admitted that the complainant has no personal security for the payment of his mortgage debt; that the mortgaged premises are an insufficient security for its payment, and that the defendants, the owners of the equity of redemption, have let the property, and take the rent, leaving the taxes unpaid, and also the interest upon the mortgage. There is, at least, a year's interest due on the mortgage, and the taxes for the last three years are unpaid.

The defendants insist that, inasmuch as the lien of those taxes is, under the adjudication in *Morrow v. Dows*, 1 *Stew.* 459, subsequent to the lien of the mortgage, there is no ground for the appointment of a receiver according to the decision in *Cortelyou v. Hathaway*, 3 *Stock.* 39. But, apart from the non-payment of the taxes, there is, in this case, misappropriation of the rents in not applying them to keeping down the interest. The defendants take the rents to their own use, and leave the interest unpaid.

There will be a receiver.

CALEB S. GREEN and others, executors of HENRY W.
GREEN, deceased,

v.

SUSAN MARY GREEN and others.

1. A testator disposed of the *residuum* of his estate, and afterwards provided, by codicil, that any share that he then was, or thereafter might become entitled to, from the estate of his brother, should be

Green v. Green.

taken as part of his residuary estate. By an agreement made in the testator's life-time, between his brother's residuary legatees, widow and next of kin, a certain share of his brother's estate was set off to the testator.—*Held*, that such share was vested, and must be held on the same trusts, etc. as the *residuum*.

2. The will contained express directions that such trustees might keep any part of the trust fund invested in the stocks, etc. left by him and assigned by the executors to them, without liability for loss by depreciation.—*Held*, that this clause includes the stocks, etc. received by the testator on account of his share of his brother's estate.

3. Where the interest on residuary personal estate is given to a legatee for life, without any direction as to accumulation, the interest which accrues thereon within the year next succeeding the testator's death, goes to the legatee for life, although the exact amount of the *residuum* is not then ascertainable, subject, of course, to the prior rights of creditors and legatees; nor is such right affected by the fact that the *residuum* is given to trustees instead of the interest being given directly to the legatee.

Bill by executors for construction of will and directions.

Mr. Cortlandt Parker, for the executors.

Mr. James Wilson, for Mrs. Blackwell.

Mr. F. Kingman, for the guardian *ad litem* of the infant defendant.

THE CHANCELLOR.

By the ninth section of his will, which is dated August 16th, 1871, Henry W. Green directed that all the residue of his estate be divided into three equal parts or shares, and gave one of those parts to his wife and another to his son,

NOTE.—In addition to the authorities referred to by the chancellor, and those in 2 *Rop. on Leg.* 1322, 2 *Redf. on Wills* 570, 2 *Wms. on Ex'rs* 1391 *et seq. notes*, where very many cases may be found, the following citations show in what instances a tenant for life is entitled to interest on his share from the time of the testator's death:

Minot v. Amory, 2 *Cush.* 377; *Treadwell v. Cordis*, 5 *Gray* 341; *Sargent v. Sargent*, 103 *Mass.* 297; *Cooke v. Meeker*, 42 *Barb.* 533, 36 *N. Y.* 15; *Wil-*

Green v. Green.

and directed that the other, being his daughter's share, be held in trust for her; and he accordingly, by the tenth section, gave that share to his brother, Caleb S. Green, and his son, Charles E. Green, and to the survivor of them, his executors, administrators and assigns, in trust, as to \$20,000 of it, to pay her the interest for life, to her separate use, and, after her decease, to pay the principal, or deliver or divide the securities in which it may be then invested, to or among the persons to whom she may give it or them by her will, or, in case she leaves no will, then to her next of kin, except any husband she may have; and as to the rest of the share, to hold it on the same trust declared in her marriage settlement. By the same section he further provided, declared and directed that it should be lawful for the trustees, their successors and assigns, to hold as part of the trust funds, without being liable for the depreciation of the same in value, any bonds, stocks or securities belonging to his estate, and which might be, by his executors, assigned to the trustees as part of his daughter's distributive share of his estate. By the eleventh section he provided that the share given to his wife should, in the event of her death in his life-time, go to his son. By a codicil, made June 3d, 1875, he states and provides as follows:

"Whereas, since the execution of my said will, some share or portion of the estate of my brother, John C. Green, deceased, has or may become vested in me, now it is my desire, and I do order and direct, that whatever share or portion or sum or sums of money I now am or may hereafter in anywise become entitled to from the estate of my said brother, shall be deemed and taken as part of my residuary estate, and be disposed of in the manner and subject to all the provisions, directions, limitations and appointments mentioned and declared in

Williams's Case, 12 *N.Y. Leg. Obs.* 179; *Fish's Case*, 19 *Abb. Pr.* 209; *Pierce v. Chamberlain*, 41 *How. Pr.* 501; *Lawrence v. Embree*, 3 *Bradf.* 364; *Lynch v. Mahoney*, 2 *Redf.* 434; *Eyre v. Golding*, 5 *Binn.* 472; *Hilyard's Estate*, 5 *Watts & Serg.* 30; *Spangler's Estate*, 9 *Watts & Serg.* 130; *Bird's Estate*, 2 *Pars. Eq.* 168; *Sergeant's Estate*, 9 *Phila.* 346; *Beasley v. Knox*, 5 *Jones Eq.* 1; *McWilliams v. Falcon*, 6 *Jones Eq.* 235; *Harrison v. Henderson*, 7 *Heisk.* 315.—REP.

Green v. Green.

and by the ninth, tenth and eleventh sections of my said will of and concerning my residuary estate."

By an agreement made in the life-time of the testator, and after the death of his brother, John C. Green, between the residuary legatees of the latter and his widow and next of kin, it was agreed that the residue of the estate of John C. Green, except goods and chattels and real estate specifically bequeathed and devised, after deducting the costs and expenses of settling the estate and executors' fees and commissions, should be divided into two parts, of which one should go to the residuary legatees of John C. Green, deceased, and the other, after deducting therefrom the pecuniary legacies, should go to the widow and next of kin, one-third to the widow, one-sixth to each of the brothers of John C. Green, and one-sixth to the children of his deceased sister. This agreement was made to prevent litigation, and settle all disputes and controversies relative to the validity and construction of the will and the administration and disposition of the estate.

By their bill, in this cause, the executors of Henry W. Green ask instruction as to whether the stocks and securities which were received by them under the last-mentioned agreement, as and for the share of their testator, of the residue of the estate of John C. Green, deceased, are bequeathed by the will of their testator, and form part of his residuary estate therein mentioned; whether, if the same form part of that residuary estate, and the share of the testator's daughter therein is to be held by them as trustees for her, their duty as executors requires them to sell the securities now held by them, and invest the proceeds on bond and mortgage, state stocks or bonds or government bonds, or whether they may lawfully receive and hold, for the benefit of the trust, one-third of the very stocks and securities held by them as executors, as well those contained in their inventory of the estate of their testator as those received by them from the estate of John C. Green, deceased, as the share of their testator, under the agreement before mentioned.

Green v. Green.

By the answer of the testator's daughter, Mrs. Blackwell, another question is propounded—whether she is not entitled to interest on her share of the residuary estate of her father from the time of his death.

It is clear, that the money or securities received by the complainants for the interest of their testator, under the before-mentioned agreement, constitute part of his residuary estate. In the first place, his interest acquired under the agreement was a vested one. The agreement, by its terms, provided that, in case of the death of any or either of the persons entitled to a share of the residuary estate of John C. Green, thereunder, the share should be paid to his or her personal representatives. Without this provision the right to such share would, in the event of the death of the person entitled thereto, have passed to his or her personal representatives. On the death of Henry W. Green his share under that agreement constituted part of the estate disposed of by his will. But further, that share is embraced in the terms of the codicil of June 3d, 1875, before mentioned. The testator thereby declares it to be his will that whatever share or portion, or sum or sums of money he then was, or might thereafter in anywise become entitled to from the estate of his brother, John C. Green, should be deemed and taken as part of his residuary estate, and be disposed of in the same manner and be subject to all the provisions, directions, limitations and appointments mentioned and declared in and by the ninth, tenth and eleventh sections of his will of and concerning his residuary estate. It is to be remarked that he does not confine the provision to money or property received or to be received under the will of his brother, but expressly includes whatever share or portion, or sum or sums of money he then was, or thereafter might become in anywise entitled to from his brother's estate. It is equally clear that the executors are at liberty, as trustees of Mrs. Blackwell, to receive and hold for her share of the residuary estate her proportion or share of the very stocks and securities in which the residuary estate is invested. The testa-

Green v. Green.

tator, by the will, declares that it shall be lawful for the trustees, their successors and assigns, to hold, as part of the trust funds of Mrs. Blackwell, without being liable for the depreciation thereof in value, any bonds, stocks, or securities belonging to his estate which may be, by the executors, assigned to them as part of his daughter's distributive share. Moreover, by the bill, it appears that the testator's widow and son are willing to accept, for their shares of the residuary estate, a due proportion of the stocks and securities in which that estate is invested, and, on the hearing, the daughter, by her counsel, declared her wish that her share should be received in like manner.

The question of interest, presented by the answer, remains to be considered. By the will part (to the value of \$20,000) of the share of Mrs. Blackwell is to be held in trust for her for life, with remainder to her legatee or legatees, or, if she shall die intestate, then to her next of kin other than any husband she may have. As to the rest, it is to be held on the trusts declared in the marriage settlement, which are similar to those declared in the will. The debts of the testator, and the general legacies given by the will, are all paid. The executors insist that Mrs. Blackwell's share of the residuary estate shall bear interest, not from the death of the testator, but from the expiration of the period of one year from that time. The rule that where the residuary personal estate is given to the legatee for life, the interest which accrues thereon from the time of the death of the testator shall, in the absence of any direction to accumulate, go to the life tenant, is established. It does not rest on the presumption that the life interest was given for support, but on the equity which seeks to give to each (the life tenant and the remainderman) his due. If the distribution, or payment, or delivery of the residuary estate be postponed until the end of a year from the death of the testator, the share assigned to Mrs. Blackwell must include her share of the interest earned by the securities in which the residuary estate has been invested. To give the interest

Green v. Green.

to the remainderman, by treating it as a part of the principal, would be unjust to her.

The rule which gives the executor one year for the payment of legacies was made to secure him from embarrassment in the settlement of the estate. If he has no reason for withholding the *residuum* from the residuary legatees, he may, if he sees fit, pay or deliver it over at once, and then the life tenant will at once begin to receive the benefit of the interest. If the executor sees fit to retain the estate in his hands until the end of the year, that fact should not affect the rights of the life tenant. It should not subject him to the loss of the interest. "It appears now to be settled," says Roper, "that the tenant for life is entitled, from the death of the testator, to the income of all such parts of the residue as consist of moneys in the funds, government or real securities, or otherwise in a state of investment, in accordance with the directions of the will, so far, of course, as such income is not required for the payment of debts and legacies. The tenant for life is also entitled to the income of all such investments as may have been made pursuant to the will during the first year." 2 *Roper on Leg.* 1322; *Williamson v. Williamson*, 6 *Paige* 298. "The result of the English cases appears to be," said Chancellor Walworth, in that case, and I have not been able to find any in this country establishing a different principle, "that in the bequest of a life estate in a residuary fund, where no time is prescribed in the will for the commencement of the interest, or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator." See, also, *Lovering v. Minot*, 9 *Cush.* 151, 156; *Lamb v. Lamb*, 11 *Pick.* 371; and 2 *Redf. on Wills* 570. It is suggested by the counsel of the executors that all the cases cited on the hearing, in which the rule under consideration has been applied, are cases in which the *residuum* has been given to a legatee for life, with remainder over, and that the rule does

Slack v. Emery.

not apply to such a case as this, where the *residuum* is given to trustees in trust to pay interest, &c. But it does apply to the case where the gift is to a trustee charged with the duty of investment, so far as any securities are concerned, upon which interest is received within the year, whether the securities be new investments or old, whether they be investments in which the fund is received from the estate of the testator or new ones made by the trustee. The fact that a trustee is interposed between the legatee and the legacy can make no difference in the application of the rule. The rights of the life tenant, as between him and the remainderman, in respect to the subject under consideration, are not changed or affected by that fact. *Hewitt v. Morris*, 1 *Turn. & R.* 241; *La Terriere v. Bulmer*, 2 *Sim.* 18; *Douglas v. Congreve*, 1 *Keen* 410; and *Lovering v. Minot*, 9 *Cush.* 151, were cases in which the *residuum* was given in trust for life, with remainder over, and where the interest which accrued from the death of the testator was awarded to the life tenant.

There will be a decree in accordance with these views.

ANDREW SLACK

v.

ELIZABETH EMERY and others.

A mortgage and lease given to a wife as part of a family settlement, protected in equity by requiring payment out of the deceased husband's personal estate of a mortgage in suit for foreclosure, which, if foreclosed, would deprive her of her security.

Bill to foreclose. Cross-bill of Delilah Slack. On final hearing on pleadings.

Slack v. Emery.

Mr. J. N. Voorhees and *Mr. G. A. Allen*, for Andrew Slack, administrator.

Mr. J. T. Bird, for Delilah Slack.

THE CHANCELLOR.

Reeder T. Slack, who died July 24th, 1874, by his will, dated April 11th, 1860, after providing for the payment of his debts, gave to his wife, Delilah, the use, for life, of all his real and personal estate, with remainder to his three daughters, Anna Maria, Elizabeth and Emma Francis. Subsequently, and on the 19th of August, 1869, he, with his wife, gave to the Frenchtown Building and Loan Association a mortgage on a lot of land in the borough of Frenchtown, to secure the payment of \$200, with interest thereon, to be paid monthly, according to the conditions and by-laws of the association. On the same day, he and his wife gave to the executors of Harmon Dilts, deceased, a mortgage on the same lot, to secure the payment of \$720.48 one day after the death of Mrs. Slack. On the 23d of August, 1869, he and his wife gave to John and William Chandler, children of Mrs. Slack by a former husband, a mortgage on the same lot, to secure the payment of \$375.68 one day after the death of Mrs. Slack. On the 4th of July, 1872, he and his wife leased to his daughter Anna Maria, the westerly half of the same lot, for the life of Mrs. Slack, reserving an annual rent of \$60 during that period, payable to her, and they thereupon conveyed that half of the lot to his daughter Emma Francis, subject to the lease. On the same day they conveyed the easterly half of the lot to Emma Francis, and she and her husband thereupon gave to Mrs. Slack a mortgage thereon, to secure the payment to her of \$60 a year for her life. On the same day Slack and his wife conveyed to his daughter Elizabeth a lot of land in Belvidere, and she then gave to Mrs. Slack a mortgage thereon, to secure to her the payment of \$60 a year for life. Mr. Slack, by these conveyances, disposed of all his real estate.

Slack v. Emery.

On his death, letters of administration *cum testamento annexo* were issued to Sylvanus D. Slack, the husband of Emma Francis. The estate has been settled. There is a balance of the personal estate in the administrator's hands of \$819.91.

The mortgage given to the executors of Dilts was assigned, October 3d, 1876, to Andrew Slack, father of Sylvanus D. Slack, and the mortgage given to the building and loan association was assigned to him on the 7th of November following. On the 11th of January, 1877, he filed his bill in this court to foreclose the latter mortgage. On the 9th of April following, Mrs. Slack filed her cross-bill in the suit, praying that the debt which that mortgage was given to secure might be paid out of the personal estate of her husband remaining in the hands of his administrator, Andrew Slack, and Sylvanus D. Slack alone answered. A replication was filed. The cause was heard on the foregoing facts, which are admitted by the answer. The defendants, on the cross-bill, insist that, inasmuch as Mrs. Slack signed the mortgage to the building and loan association with her husband, she, under the circumstances, can set up no equity arising out of the family arrangement against it; that the mortgage having been given before that arrangement was made, she herself must be held to have accepted the arrangement, subject to the payment of the mortgage out of the mortgaged premises, and that she must have known the provisions of her husband's will, and that by it the personal estate went to her husband's daughters after her death. They further insist that it is to be presumed that the family arrangement was not intended to defeat or disturb the provisions of the will as to the personal estate of the testator; that as no claim was made by the holder of the mortgage to the building and loan association upon the estate of Mr. Slack in the hands of the administrator, it is now too late, in view of the fact that the usual rule to bar creditors was taken, and the time therein limited has expired, to make such claim; and, lastly, that the holders of the Dilts and Chandler mortgages have the same right to

Slack v. Emery.

payment of their mortgage debt out of the personal estate as the holder of the mortgage given to the building and loan association, and, as there is not enough personal estate left to pay all of them, this court should not order the payment of any of them out of it. None of these objections are valid. The personal property is the primary fund for the payment of the debts of the testator, in the absence of any provision to the contrary in his will. *Whitehead v. Gibbons*, 2 Stock. 230; *Keene v. Munn*, 1 C. E. Gr. 398; *Thomas v. Thomas*, 2 C. E. Gr. 356.

In this case there is no provision in the will to the contrary. I do not perceive any ground of equity in the case arising out of the fact that Mrs. Slack joined with her husband in executing the mortgage to the building and loan association. The debt was her husband's debt, and is secured by his bond. She has the right, under the circumstances, to demand that it be paid out of the personal property. It is necessary that that be done in order to save her mortgage on part of the mortgaged premises, and her rent payable on the lease of the other part. The mortgage and lease were, it is admitted, part of a family arrangement. The deeds to the daughters were in consideration merely of natural love and affection, and no question is made that by the arrangement the testator intended to dispose of all his real estate for the benefit of his children, securing to his wife, by the rent and mortgage, the provision which it was agreed in the arrangement should be made for her. Nor does the fact that the holder of the building and loan association mortgage has not seen fit to have recourse to that fund, deprive her of her equity. This court may compel payment to him out of the personal estate. Neither does the fact that the holders of the Dilts and Chandler mortgages, respectively, hold the bond of the testator for their mortgage debt, and that those mortgages were both registered before the mortgages given to the building and loan association, and are entitled to priority in payment over it, affect the claim of Mrs. Slack to the equity. The holders

Brasted v. Sutton.

of those bonds have made no claim upon the personal estate, but propose, it appears, to look to the mortgaged premises for satisfaction of their mortgage debts. The fact that they have not proved their debts against the mortgagor's personal estate will not prejudice them in subjecting the mortgaged premises to the payment of their debts. 1 *Jones on Mort.* § 729. They make no opposition to Mrs. Slack's claim that the mortgage given to the building and loan association shall be paid out of the personal estate. Their mortgages are not due. They are not payable until after the death of Mrs. Slack. They do not imperil her security.

Mrs. Slack is entitled to the relief which she seeks by her bill.

JOHN BRASTED, executor,

v.

GEORGE M. SUTTON and wife and others.

On an application to equity to aid a mortgagee, who was prosecuting an ejectment at law to obtain possession of the property under his mortgage, a receiver was appointed. It appeared that the mortgagor was insolvent and had removed from the premises and given possession to another who occupied for his own use without paying rent; and it appeared, also, that the mortgagor had committed waste, and threatened to commit more, and that the premises were an insufficient security.

Bill to foreclose. Petition for receiver. On order to show cause and affidavits.

Mr. C. J. Roe, for complainant.

Mr. L. Cochran, for mortgagor.

Carpenter v. Smith.

THE CHANCELLOR.

This application is made in aid of proceedings at law—an action of ejectment brought by the complainant on his mortgage for the recovery of possession of the mortgaged premises. The mortgagor is insolvent; the property is an insufficient security; the mortgagor has moved away from the premises and given possession to a person who is to occupy them for his own use without payment of rent and without accounting for the use thereof; and the mortgagor has committed waste and threatened to commit more.

A receiver will be appointed.

REBECCA CARPENTER, executrix,

v.

REBECCA S. SMITH and others.

A sale of lands under foreclosure to the mortgagee was set aside, and the mortgagor let in to answer, where it appeared that the mortgagor was a very old and infirm woman, depending on her daughter to attend to her affairs, and that the daughter had used diligence, both in employing counsel at the commencement of the suit, and after it was ascertained that her solicitor had neglected to defend the action, which she learned only after the property had been advertised for sale, the surprise being proved, and the question of merits appearing to be an open one.

Bill to foreclose. On petition to set aside sheriff's sale under *fi. fa.* for sale of the mortgaged premises, and for leave to defend.

Mr. J. K. R. Hewitt, for the petitioner.

Mr. J. H. Carpenter, for complainant.

Carpenter v. Smith.

THE CHANCELLOR.

The defendant, Rebecca S. Smith, the mortgagor, asks that the sheriff's sale of the mortgaged premises under the *feri facias*, may be set aside, and that she may be permitted to answer. Surprise and merits are the grounds of the application. The former is very clearly established. The proof shows that, three days before the return of the subpoena to answer, her daughter, who attended to all her business matters for her, went to Trenton and consulted counsel in regard to the defence of the suit by her. He gave to her daughter a written memorandum of information which he wanted, but afterwards told her to do nothing about the matter until she heard from him. She did not hear from him, and was surprised to learn, as she did from a neighbor, that the property was advertised for sale. She then obtained other counsel, who procured an adjournment of the sale, and undertook to apply, in her behalf, for leave to defend. Before he had prepared the requisite papers, the day to which the sale had been adjourned arrived. He sent the daughter to the place at which the sale was to be made, to request a further adjournment. She went accordingly, but her application was unsuccessful, and the sale took place. Under the circumstances, I do not think that the mortgagor should be regarded as barred in this application by laches. She appears to be an aged person, incapable of attending to business for herself, and her daughter seems to have used all the diligence in the matter which could have been reasonably expected of her. Though the question of merits presents some difficulties, yet there is enough shown to induce the belief that justice will be best done by giving the mortgagor an opportunity of defence.

The sale will, therefore, be set aside (the complainant was the purchaser), and the proceedings opened, and the mortgagor let in to answer.

Wills v. McKinney.

JOHN S. WILLS

v.

WILLIAM MCKINNEY and others.

1. In a foreclosure suit, the answers of some of the defendants admitted that the mortgagor made "some such bonds and mortgages" as two of those of the complainant stated in the bill—his second and third mortgage.—*Held*, that, as to those mortgages, this was such an admission as to render any proof, except the production of the instruments at the hearing, unnecessary.

2. The complainant derived title to the mortgages under a will and codicil thereto. The answer of the mortgagor did not deny the complainant's title to them, but did not expressly admit it. The answer of the other defendants admitted his title.—*Held*, that the complainant would be permitted to put in the second and third mortgages and the probate of the will and codicil as on the hearing.

Bill to foreclose. On final hearing on bill, answers and replications.

Mr. Alfred Mills, for complainant.

Mr. C. D. Thompson and *Mr. Joseph Coult*, for answering defendants.

THE CHANCELLOR.

The question between the complainant and answering defendants is, as to the effect of certain admissions in each of the answers (the answers are filed by the defendants, McKinney, Decker, Byram, Olstead and Hart, respectively), and the silence of one of them (that of McKinney) as to the fact of the death of the mortgagee and the making and probate of his will and codicil thereto, under which the complainant, by the bill, claims title, as his residuary legatee, to the mortgages, which are three in number. The cause was set down for hearing on the bill, answers and replications.

Wills v. McKinney.

The answer of McKinney admits the execution of all the mortgages. They were all given by him. The others explicitly admit the first one. As to the second and third, they admit that McKinney made "some such" bonds and mortgages, and, for greater certainty, ask leave to refer to them when produced and proved. This is such an admission in reference to the mortgages as renders unnecessary any proof except the production of the instruments at the hearing. *Dan. Ch. Pr.* (4th ed.) 838; *Gres. Eq. Ev.* (Am. ed.) 11, *note*; *Rowland v. Sturgis*, 2 *Hare* 520. If duly acknowledged, no extraneous proof is needed. The production of them at the hearing was not required by defendants' counsel.

All the answers, except that of McKinney, admit the death of the mortgagee at or about the time mentioned in the bill; that he left "some such last will and testament and codicils thereto;" and admit that the complainant is the owner of the bonds and mortgages, and, for greater certainty, ask leave to refer to the will and codicil when produced and proved. It will be seen that they admit that the complainant is the owner of the bonds and mortgages. This admission is sufficient, and renders any proof on the subject of the complainant's title unnecessary. *Gres. Eq. Ev.* (Am. ed.) 11, *note*.

McKinney's answer contains no reference to the will or the complainant's title to the mortgages. It does not deny or question that title, and, setting up usury against the first mortgage, it *prays* that it may be decreed to be void therefor; and it *prays*, also, that an account may be taken of the amount, if anything, due on the second and third mortgages, and that McKinney may be allowed such deduction therefrom, and such credits thereon, as may be equitable and just.

The complainant will be permitted to put in the second and third mortgages and the probate of the will and codicil as on the hearing.

Barnes v. Taylor.

ISAAC BARNES and others

v.

JOHN L. TAYLOR and others.

A decree directed the payment of certain moneys to the complainants therein, as to some of them to them or to their solicitor, and as to the other to her. The complainants' solicitor served on the solicitor of the defendants a copy of the decree, with a notice endorsed thereon, that he had a lien on the moneys therein directed to be paid. The defendants' solicitor concluding that the complainants' solicitor had, in fact, no claim upon the money, paid it over to the complainants.—*Held*, that the defendants were liable for the amount of the lien of the complainants' solicitor for services and disbursements; and that a reference should be ordered to ascertain the amount of such lien, etc.

On order to show cause why defendant John L. Taylor should not be required to pay the amount (not exceeding the amount by the decree ordered to be paid to the complainants) for which the complainants' solicitor claims to have had a lien upon the decree for his disbursements and costs. On affidavits and exhibits.

Mr. S. D. Dillaye, in pro. pers.

Mr. J. S. Aitkin, for defendant John L. Taylor.

THE CHANCELLOR.

By the final decree in this cause, the defendant, Dr. John L. Taylor, was ordered to pay certain moneys to the complainants within a time therein limited. Mr. Dillaye, the solicitor of the complainants, served a copy of the decree on Mr. Aitkin, the solicitor of Dr. Taylor, with a notice endorsed thereon and signed by himself as solicitor, that he had a lien upon the moneys therein directed to be paid. Notwithstanding this notification, and in disregard of it, the entire amount of the money was, without Mr. Dillaye's con-

Barnes v. Taylor.

sent, paid over to the complainants. Mr. Aitkin testifies that in conversation with Mr. Dillaye on the subject, after the copy of the decree was served, he urged the latter to take action, such as he might deem proper, by obtaining the consent of his clients, or otherwise, to prevent the payment of the money by Dr. Taylor to the complainants, who were, by other counsel, pressing for payment thereof to them, and insisting that Mr. Dillaye had no just or lawful claim thereon. He further says that Mr. Dillaye promised to take such action, and, in view of the fact that he was about to leave town for a few days, but expected to return on the following Tuesday or Wednesday, requested that the money should not be paid over to the complainants until after his return; that he acceded to the request so far as to agree not to pay over the money before Wednesday. He says that he then told Mr. Dillaye that if he could not get the matter settled with his clients, he had better get an order that the money be paid into court, as, from the form of the decree, and what the complainants had said to him, the money could not be paid to Mr. Dillaye. Mr. Dillaye did not return home on Tuesday or Wednesday. On the latter day the complainants appeared and demanded payment from Mr. Aitkin. They informed him that they had endeavored to find Mr. Dillaye, but were unsuccessful and were unable to ascertain when he would return. He thereupon postponed the payment until the following Friday. He says that on that day, Mr. Dillaye not yet having returned and neither he nor his client having heard anything from him, he having satisfied himself that there was nothing due to Mr. Dillaye, as solicitor or counsel, from the complainants, paid over the moneys to them on their receipt.

It appears to me to be quite clear that that payment, so far as Mr. Dillaye's lien is affected by it, cannot be allowed. Dr. Taylor had notice that Mr. Dillaye claimed a lien, as solicitor, upon the money which, by the decree, he was required to pay. The notice was of itself sufficient reason for his refusal to pay the money to the complainants, and if,

Barnes v. Taylor.

when they notified him not to pay it to Mr. Dillaye, he was embarrassed by the conflicting claims, he might readily have obtained permission to pay the money into court, or he might have refused to pay it to either until the question between them in reference to it was settled. He was not required to adjudicate upon the claim of Mr. Dillaye, nor was it proper for him to assume to do so. It was enough for him to know that Mr. Dillaye claimed a lien, to justify him in refusing to pay the money to the complainants. When he paid over the money on the assumption or conviction that nothing was due to Mr. Dillaye as solicitor, he incurred the risk of paying him whatever (not exceeding the amount paid to the complainants) he might prove to be due to him under his lien. The court will protect the lien of the solicitor under such circumstances. *Welsh v. Hole*, Doug. 238; *Martin v. Hawks*, 15 Johns. 405.

There was nothing in the form of the decree to justify the payment in disregard of the notice. The money payable to all the complainants except Mrs. Paxson was, by the terms of the decree, payable to them or their solicitor. The directions as to that which was to be paid to her, was that it be paid to her. If there had been no direction to pay any of the money to the solicitor, it would not have justified the payment to the complainants in disregard of Mr. Dillaye's rights. There will be a reference to a master to ascertain the amount for which Mr. Dillaye, as solicitor, was entitled to a lien. He claims, also, to have been, and still to be entitled, under a stipulation between him and his clients, to one-seventh of the amount which Dr. Taylor was decreed to pay, and, in his affidavit, he says that he exhibited the stipulation to both Dr. Taylor and Mr. Aitkin, and informed them of his rights and demand thereunder. They both deny, however, that he informed them of this claim, either by showing the stipulation or otherwise. The stipulation is entitled in the cause. It states that the decree for partition has been made; that the complainants have, in pursuance of the contract with him, conveyed to Mr. Dillaye one-sev-

Cook v. Bodine.

enth of the land recovered by them, and they thereupon stipulate that, in making the partition, his seventh may be set off to him, and that one-seventh of the rents and profits received by Dr. Taylor for the six years prior to the commencement of the suit, be set apart to Mr. Dillaye; and it further provides that the stipulation may be entered in the cause, and that for that purpose Mr. Dillaye may be made a party to the suit. If the money thereby assigned to him was money due him for his services as solicitor in the cause and his disbursements therein, his lien will cover it.

LEWIS D. COOK and others

v.

JOHN BODINE and others.

In 1872, complainants conveyed the fee of certain lands to a judgment debtor, whose father advanced the consideration. For improvements thereon afterwards made by the complainants, they received first a mortgage, and then a deed for the premises, to re-imburse them. —*Held*, that the lien of the judgment, which was obtained in 1867, was superior to their equitable rights in the premises.

Bill for relief. On final hearing on pleadings and proofs.

Mr. R. V. Lindabury, for complainants.

Mr. J. G. Bergen, for defendants.

THE CHANCELLOR.

The complainants file their bill to restrain the defendants from executing against certain land in the bill described, a judgment recovered by Bodine & Co., in Somerset circuit court, against Theodore Giles, on the 5th of June, 1867, for

Cook v. Bodine.

\$350.69. The ground on which the relief is asked, is as follows: In the winter of 1871, the complainants, who were lumber dealers in Bound Brook, and in whose employ Theodore Giles then was, proposed to Richard F. Giles, the father of the latter, that he should buy a lot of land there from the complainant Lewis D. Cook, and give it to his son, and offered, if he would do so, to advance the requisite money to the son to enable him to build a house on the property, the repayment of the advances to be secured to them by first mortgage of the property, to be given when the house was completed. The offer was accepted, and Richard F. Giles bought the lot accordingly, and paid to Lewis D. Cook \$500 in full for the price of it, and Lewis D. Cook conveyed the property to Theodore Giles accordingly, by deed dated March 29th, 1872. The complainants borrowed of Cornelius V. N. Stryker \$2,100, to enable them to make the advances, and carried the amount to the credit of Theodore Giles on their books. They advanced to the latter in all, for the building of the house and grading the lot, about \$4,500. He himself contributed nothing. On the 2d of October, 1872, the house being then nearly completed, Theodore Giles gave a mortgage on the property to Stryker, to secure the \$2,100 lent by the latter to the complainants, as before mentioned, and interest, and Stryker, in consideration thereof, discharged the complainants from liability to him for or on account of the loan. On the 1st of January, 1872, Theodore Giles gave a mortgage on the property to his father, to secure the payment of \$1,000, which the latter lent him previously to 1872 to put into the business of the complainants, who became sureties to the father for its repayment. On the giving of that mortgage, the father, in consideration thereof, discharged the complainants from liability to him on account of that loan, and the son was credited with the amount on the complainants' claim against him for advances. After giving the mortgage to Stryker, and applying the \$1,000 last mentioned, there was due to the complainants, on account of the advances, on

Cook v. Bodine.

the 13th of April, 1875, \$1,500, for which Theodore Giles and his wife gave to them a mortgage on the property. Subsequently, on the 7th of March, 1877, he and his wife conveyed the property to them, and they, since then, have paid interest to both Stryker and Richard F. Giles on their respective mortgages.

It is not denied that the judgment is a valid one, or that there is due thereon the amount claimed by the plaintiffs therein. Nor is any estoppel claimed as against the plaintiffs in the judgment. The claim to the relief sought is placed on the ground of equitable preference in favor of the complainants over Bodine & Co.'s legal right, in view of the fact that the former agreed to provide, and did furnish accordingly, the money for building the house, on an agreement that its payment was to be secured by a mortgage which was to be the first encumbrance on the property. The fact that the complainants were, when they made their advances, ignorant of the existence of the judgment, is not, in itself, a ground of equitable relief. *Haggerty v. McCanna*, 10 C. E. Gr. 48; *Dillett v. Kemble*, *Id.* 66. An examination of the records would have apprised them of it.

When Lewis D. Cook conveyed the lot to Theodore F. Giles, receiving full payment of the consideration money, the judgment thereupon became, by operation of law, a lien thereon. The vendor was paid in full, and the title to the property was absolute in the vendee. The wife of the latter would have been entitled to dower in it, and her interest surely was not liable to be affected by the collateral agreement made by the complainants with her husband's father, that if he would pay the purchase-money for his son, as a gift to the latter, they would aid the son in building a house on the property. No more was the legal lien of the judgment affected by that agreement. It is not difficult to perceive that to allow equitable preference to such claims as that of the complainants in this case, over legal encumbrances, would be to subject the latter to liabilities which would not only be unjust, but which would often be

Thornton v. Roberts.

destructive of them. It would enable the judgment debtor, by means of equitable liens for improvements put on the property, to postpone, and so, perhaps, render worthless the legal lien, which is by law entitled to priority.

The bill will be dismissed, with costs.

SAMUEL C. THORNTON, trustee,

v.

ISAAC ROBERTS.

A testatrix gave to A. the interest on \$2,000 from the time of her death, provided A. survived B., and, in that event, after A.'s decease, the \$2,000 to be equally divided among A.'s children. But if A. did not survive B., then, at A.'s death, the \$2,000, together with the accrued interest, was "to go to and be equally divided between all my nieces and my nephew W. and the children of my deceased nephew S." A. died before B., and between the time of testatrix's death and A.'s death certain of her nephews and nieces died, including W.—*Held*,

(1) That the interests of all of the nieces and of W., although contingent on the death of A. before B., vested at the decease of the testatrix, and, consequently, the shares of those deceased before A. were transmissible to their several next of kin.

(2) That the children of S. took *per capita* with testatrix's nieces and W.'s representative, no contrary intention appearing in the will.

Bill for construction of will and directions to trustee. On final hearing on pleadings.

Mr. F. Voorhees, for complainant.

Messrs. P. L. Voorhees, M. R. Sooy, D. J. Pancoast and W. A. Barrows, for defendant.

THE CHANCELLOR.

Hope Haines, late of the county of Burlington, died February 22d, 1844, leaving her last will and testament,

Thornton v. Roberts.

dated November 17th, 1841. The eighth item of the will is as follows:

“I will and bequeath to my well-beloved nephew Aquilla S. Ridgeway, after the death of his present wife Anna Ridgeway, if he should outlive her, then immediately after her death, in his life-time, I bequeath, to be paid over to him by my executors, that is, if he should outlive this present wife, the interest of two thousand a year for every and each year from my death until his present wife Anna Ridgeway's death, that is, if he should outlive her, and the interest of said two thousand every year and yearly to my said nephew from his present wife's death during his life and as long as he lives; and at his death, if he should leave more than one child, or the descendant of more than one child, to arrive at lawful age, I bequeath, and it is my will, that the said two thousand dollars shall be equally divided and paid to his said children; but if he should leave more than one child, and any of them should be deceased, leaving child or children, they shall stand in their deceased parent's place, and take their share equal between them, if more than one. But if my said nephew, Aquilla S. Ridgeway, should die in the life-time of his present wife Anna Ridgeway, and she should outlive him, then at his death, in her life-time, I bequeath, and it is my will, that the said principal sum of two thousand dollars, with its interest from my death until my said nephew's death in the life-time of his present wife, then to go to and be equally divided between all my nieces and my nephew Wallace Lippincott and the children of my deceased nephew, Stacy Lippincott, that is, in case my said nephew, Aquilla S. Ridgeway, should die before his present wife, Anna Ridgeway; but if my said nephew should outlive this present wife that he now has, and she die before him, my said nephew, it is my will that then, at her death in his life-time, and I bequeath the two thousand dollars aforesaid, with its interest from my death until her death, unto him for my said nephew to receive all the interest due thereon at her death from my death in his own hands paid, and the interest of the two thousand from her death, yearly, during his life; and if, in case that at his death after the death of his wife, he should leave but the one child, or the descendants of but the one child, to arrive at lawful age, he having a great sufficiency therefor, I bequeath the said principal of two thousand dollars (he to receive the interest thereof yearly during life after the death of his present wife, Anna Ridgeway), after his death, equally between all my nieces and my nephew Wallace Lippincott and the children of my deceased nephew, Stacy Lippincott; but if my said nephew, Aquilla S. Ridgeway, should die after his present wife, that is, if she should die before him, and at his death he being the longest liver, and should

Thornton v. Roberts.

then die leaving more than the one child, or the descendants of more than the one child, then they shall be entitled to and take the above moneys described, mentioned and set forth in this my said will, that is, if he should live longer than this wife and leave more children than one; but if he should leave but one child, or die in the life-time of this present wife, she live the longest, in that case I bequeath it, his share, equally between my nephew and nieces."

At her death her nieces and nephews were Hope Deacon, Sarah Stokes, Sarah Ann Pancoast, Mary Haines, Aquilla S. Ridgeway (legatee mentioned in the eighth item of the will) and Wallace Lippincott, and the children of Stacy Lippincott were Nathaniel Lippincott, Sarah Ann Roberts and Hope Moore. Aquilla S. Ridgeway did not survive his wife Anna, mentioned in the will. He died June 20th, 1877. Between the time of the death of the testatrix and his death, Mary Haines, Wallace Lippincott and Hope Moore died. The fund of \$2,000, mentioned in the eighth item of the will, is, with its accumulation of interest, held by a trustee, the complainant, who is desirous of paying it over to those who are entitled to it, but being in doubt as to whether the bequest over to the nieces and nephews of the testatrix and the children of Stacy Lippincott vested at the death of the testatrix or at the death of Aquilla S. Ridgeway, and whether the children of Stacy Lippincott take *per stirpes* or *per capita* with the nieces and nephews of the testatrix, he files his bill for construction of the will and for direction in the premises.

The bequest to Aquilla S. Ridgeway, of the interest for life upon the fund of \$2,000, was conditional, the contingency being his survival of his wife mentioned in the will. The bequest of the fund, with its accumulation of interest, to the testatrix's nieces, and her nephew Wallace Lippincott, and the children of Stacy Lippincott, was contingent on the death of Aquilla S. Ridgeway before the death of his wife. There is no reason why those bequests should not, for the purposes of transmission, be held to have vested, in a certain sense, at the time of the death of the testatrix.

Thornton v. Roberts.

The latter bequest was substituted. It was a contingent executory bequest, and the rule with regard to the vesting of such bequests is thoroughly established.

"It is a rule with regard to contingent executory bequests," says Roper, "that the interests of the first and subsequent takers *quodam modo vest uno instanti*; so that, if the substituted legatee die before the contingency happens upon which he is to succeed to the legacy, his representative will, notwithstanding, be entitled to it so soon as the event shall take place." 1 *Roper on Legacies* 597.

The rule is recognized by Jarman (1 *Jarman on Wills* 666) and it is laid down also by Ward. If there is a bequest to one for life, and, at or after his decease, to another, the interests of the first and second legatees vest at the same time; so that the representatives of the latter, if he die in the life of the prior taker, will be entitled. Nor is it any objection to this doctrine that the gift itself depends upon a contingency, for a contingent interest may vest in right, though it does not in possession. *Ward on Legacies* 178. See, also, 2 *Wms. on Ex'rs* 888, 889.

Contingent interests are transmissible, like vested interests. Lord Hardwick, in *Chauncy v. Graydon*, 2 *Atk.* 616, said: "Where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the first devisee, yet, if real, his heir—if personal, his executor—will be entitled to it." The same doctrine was held in *Winslow v. Goodwin*, 7 *Metc.* 363. And in our courts, in *Vandyke's adm'r v. Vanderpool's adm'r*, 1 *McCart.* 198; *Green's adm'r v. Howell*, 1 *Vr.* 326; *S. C. in error*, 2 *Vr.* 570; *Beatty's adm'r v. Montgomery's ex'r*, 6 *C. E. Gr.* 324. See, also, 2 *Redf. on Wills*, 195, *note*. The legacy of \$2,000 and accumulated interest vested in the nieces of the testatrix who were living at her death, and in Wallace Lippincott and the children of Stacy Lippincott who were living at her death, so as to be transmissible to the personal representatives of those who died after the death of the testatrix and before the death of Aquilla S. Ridge-

Thornton v. Roberts.

way. According to the general rule, the children of Stacy Lippincott would take *per capita* each an equal share with each of the nieces and Wallace Lippincott's personal representative. It is a rule that, under a devise or bequest to one and the children of another, *prima facie*, the persons all take *per capita* and not *per stirpes*. *Hawk. on Wills* 113; *Fisher v. Skillman's ex'r*, 3 C. E. Gr. 229; *Macknet's ex'r v. Macknet*, 9 C. E. Gr. 277, 294; *Smith v. Curtis*, 5 Dutch. 345. Nor is there in this will anything to lead to the conclusion that the testatrix intended that the children of Stacy Lippincott should together take only a share equal to that of Wallace Lippincott, or of each of her nieces. In other parts of the will she expresses an intention that children shall take *per stirpes* and not *per capita*, and she does so by language apt and explicit. In the fifth item she bequeaths to her nephew, Wallace Lippincott, \$120 a year (the interest of \$2,000), for life, and bequeaths the principal sum, \$2,000, at his death, to his child or children, if he should leave any, and provides that it is to go to such "child or children, equal between them, if more than one," and adds that "if any child of his should be then deceased, leaving child or children, they shall take the deceased parent's share equally, if more than one." She further provides that, if Wallace Lippincott should, at his death, leave no child or children, nor any child of any child of his, then the principal sum of \$2,000 is, at his death, to be divided equally between his sisters Mary Haines and Sarah Ann Pancoast, and the children of his deceased brother, Stacy Lippincott, and adds "that is, for his children to take the one-third of said \$2,000 equally between them, being the share thereof their father would have been entitled to if living." In the seventh item, after giving the interest of \$4,000 a year to her nieces Sarah Stokes and Hope Zelle, for life, she gives the principal, after their death, to their children, as follows:

"And at their death or either of their deaths, the child or children of the one or both deceased shall be entitled and take their deceased

Nassau Bank v. Brown.

parent's share equally between them, if more than one at the deceased parent's death."

She further provides that, if Rebecca Zelley should leave but one child living at her death, and there should no issue of the other survive her, then the share of the deceased child should go to the children of her (the testatrix's) nieces, Mary Haines and Sarah Ann Pancoast, and the children of her deceased nephew, Stacy Lippincott, "equally divided and paid between them all at her (Rebecca Zelley's) death." By the residuary clause she bequeaths the residue of her estate, as follows :

"The remainder to be equally divided between the child or children of my nephew, Aquilla S. Ridgeway, and my sister, Rebecca Zelley, each one to have an equal share thereof, and his children, or if but one child he should leave, to have its or their equal share, with the interest arising on each one's share paid them, when and as they arrive at lawful age, whether their father is deceased or living, and for all, my nieces, and nephew Wallace Lippincott, and the children of my said nephew Stacy Lippincott, to take their equal share therein with my sister Rebecca and the children of Aquilla S. Ridgeway."

This court held that, under that clause, the children of Stacy Lippincott took *per capita*. *Stokes v. Tilley*, 1 Stock. 130.

There is nothing in the will to induce hesitation in applying the general rule of construction. It will, therefore, be decreed that the children of Stacy Lippincott take *per capita*.

THE NASSAU BANK

v.

EDWARD G. BROWN and others.

By the general corporation act of 1849, the directors of any corporation organized thereunder were, in certain cases, by their non-feasance, rendered personally liable for the debts of the corporation. By the revision of 1875, it was provided that such liability should be incurred in case of neglect or refusal for thirty days after written

Nassau Bank v. Brown.

request by a creditor or stockholder to perform the duty imposed. A demurrer to a bill by a creditor, whose claim arose in 1877, was sustained, because of failure to allege that a written request to perform this duty had been made.

Bill for relief. On general demurrer to bill.

Mr. F. T. Frelinghuysen, for demurrants.

Mr. W. S. Whitehead, for complainant.

THE CHANCELLOR.

The bill is filed to establish and enforce the personal liability of the defendants for non-performance of their official duties as directors of a corporation, The Eastern Manufacturing Company, created under the act to authorize the establishment and prescribe the duties of companies for manufacturing and other purposes, approved March 2d, 1849, and the supplements thereto. *Nix. Dig.* 534. The nineteenth section of that act provides that the president and directors, with the secretary and treasurer of each company created under the act, shall, within thirty days after the payment of the last installment of the capital stock fixed and limited by the company in its certificate of incorporation, make a certificate, stating the amount of capital so fixed and paid in in cash, which certificate shall be signed and sworn or affirmed to by the president, secretary and treasurer, and a majority of the directors, and that they shall, within the thirty days, cause the certificate to be recorded in a book to be kept for that purpose in the office of the clerk of the county wherein the business of the company is conducted, or where its principal place of business or office is located; and, also, cause it to be published for three weeks in a newspaper circulating in that county. The twentieth section provides that if any of the companies shall increase their capital stock, as before provided for in the act, the officers mentioned in the nineteenth section shall,

Nassau Bank v. Brown.

within thirty days after the payment of the last installment of such additional stock, make a certificate of the amount so added and paid in in cash, and sign and swear or affirm to it, and cause it to be recorded and published in the manner provided in the nineteenth section. The twenty-first section provides that if any of those officers shall neglect or refuse to perform the duties required of them by the nineteenth and twentieth sections, or if the certificate shall be untrue, they shall be jointly and severally liable for all debts of the company contracted after the expiration of the thirty days and before the certificate shall be recorded. The bill alleges that, although the capital stock fixed and limited in the certificate of incorporation was fully paid in in cash, and although the capital was subsequently, in May, 1875, increased, and the additional stock also fully paid in in cash, the officers on whom, by the act, the duty was devolved, did not, nor did any of them, within the time fixed by law therefor, or at any time, perform or discharge any of the duties required of them by the nineteenth and twentieth sections, and that the defendants were all the while directors of the company.

By the act of 1875, concerning corporations, approved April 7th, 1875 (*Rev. p. 175*), the provisions of the before-mentioned act were revised, and while the same duties were imposed on the same officers of such companies in respect to the same matters, the provisions as to the personal liability for failure were so altered as to render the officers liable only in case of neglect or refusal for thirty days after written request by a creditor or stockholder to perform the duty imposed. The question is, whether the defendants, who were directors from the organization of the company, and when the complainant's debt was contracted (which was not until 1877, however,) are, on the averments of the bill, personally liable for the debt for non-compliance with the provisions of the act, the bill making no allegation that the officers refused, after request, nor, indeed, that any request was ever made.

Nassau Bank v. Brown.

By the revision, the act of 1849 and the supplements were, in terms, repealed, with proviso that no company established under them, or any of them, or any person having claims or demands against such company, should be affected by the repeal. It is argued that the proviso excludes all such companies from the operation of the provisions of the revision, and is equivalent to a legislative declaration that they are still to be governed, and the obligations and liabilities of their officers to continue to be fixed, by the act of 1849 and its supplements. From the time of the approval of the act of 1875 (the revision) the companies organized under the act of 1849 were governed by the act of 1875. It was not only *in pari materia*, but it was a revision, and the change before referred to as to the requisites to fix the personal liability of the officers is to be regarded just as an amendment to the act of 1849 to the same effect would have been. The repeal was for the purposes of revision merely, and when, in the revision, an alteration was made as to the requisites to fix upon the officers personal liability in respect of neglect or refusal to discharge a duty imposed by the act, while it affected no vested right of the company, nor did it deprive it of any privilege, it did affect the relations of the officers towards the creditors of the company who might become such after the revision should have gone into effect. The case differs from that of *Freehold Mutual Loan Association v. Brown*, 2 *Stew.* 121, in this: The question there was, whether the complainant corporation had been deprived, by the revision of the act under which it was created, of a privilege to take premiums for priority of loans because, in the revision, the provision that the taking of such premiums should not be deemed to be usurious was omitted, while here it is not as to the retention by the corporation of a special privilege, but as to the liability of officers to creditors of a company for non-feasance. In that case it was a question as to a privilege of the corporation, which it was held had not been expressly or by implication taken away; here it is as to a

Berlin Building and Loan Association *v.* Clifford.

regulation fixing, by way of penalty, the liability of officers to the creditors of the corporation for failure to discharge official duty. It was held, in that case, that the mere omission to enact in the revision the provisions that "no premium given for priority of loan, or acquisition of a building or discount, given on the redemption of shares, should be held to be usurious," did not, under the circumstances, deprive the complainants of the benefit of the premium.

The demurrer will be sustained.

BERLIN BUILDING AND LOAN ASSOCIATION

v.

KATE R. CLIFFORD and others.

To a bill for foreclosure filed by a second mortgagee, the first mortgagee was made a party defendant, appeared, proved her debt, and obtained a decree. At the sale of the premises, the amount realized was insufficient, after deducting execution fees, to satisfy the first mortgage. The first mortgagee insisted that the complainant must pay the execution fees.—*Held*, that the sheriff was entitled to deduct and retain his execution fees from the proceeds of the sale, and that the complainant was not liable to pay them.

Bill to foreclose.

Mr. B. Lowe, for the complainant.

Mr. H. A. Drake, for defendant Clifford.

THE CHANCELLOR.

The question presented is whether the complainant, a second mortgagee, shall be required to pay the execution fees on the sale of the mortgaged premises in this suit. The property was sold under the execution to pay, first, the

Watson v. Watson Manufacturing Co.

defendant, Kate Clifford, the amount due her on her mortgage, which was the first encumbrance on it, and then to pay the complainant the amount due on its mortgage. At the sale it did not bring enough, after deducting execution fees, to pay the first mortgagee the amount due her. She insists that the complainant should be required to pay those fees as costs incurred by it, and which it is, therefore, under the circumstances, bound to pay. The first mortgagee was made a party to the suit in respect of her mortgage. She appeared and proved her debt, and there was accordingly a decree in her favor in the suit. She might, had she seen fit to do so, have declined to appear, and had she done so she would not have been affected by the suit. *Hudnit v. Nash*, 1 C. E. Gr. 550. In that case the execution fees must have been paid by the complainant unless raised out of the property, which would have been sold subject to the first mortgage. But the first mortgagee chose to come in and have the advantage of the suit. She consented to the sale. The sheriff had a right to retain his execution fees out of the sale as against her.

JAMES WATSON

v.

THE WATSON MANUFACTURING COMPANY.

At the instance of mortgagees of the realty, the court set aside an order directing a receiver of an insolvent corporation to sell, as personal property, certain steam-engines, boilers, shafting, cupolas, radiators and a platform scale, because such articles were fixtures, and covered by the mortgage, not only from the adaptation of the buildings etc. to their erection and use, but also because their severance would greatly depreciate their value and also that of the buildings to which they were attached, and would dismantle the buildings and take away from them essential adjuncts which were placed there to adapt them to the purpose for which they were built and used, and

Watson v. Watson Manufacturing Co.

which, without them, they would not answer.—*Held*, also, that the fact that the owners of the premises had treated such fixtures as personally, in making up their accounts, in insuring them and in rating them for taxation, could not control the question.

On order to show cause why an order directing the receiver of the defendant, an insolvent corporation, to sell certain steam engines, boilers, &c., as personal property, should not be set aside or modified.

Mr. H. A. Williams, for the First National Bank of Paterson.

Mr. Frederick Frelinghuysen, for the Equitable Life Assurance Society of the United States.

Mr. A. B. Woodruff, for the receiver.

THE CHANCELLOR.

In the suit in this court for foreclosure and sale of mortgaged real estate of the defendants, in which the Equitable Life Assurance Society of the United States is complainant, a decree was made directing that the property be sold to pay the money due that society on its mortgage, and also to pay the money due the First National Bank of Paterson on its mortgage.

The mortgaged premises are part of the extensive establishment of the Watson Manufacturing Company in the city of Paterson, wherein it carried on a very large business of manufacturing iron, millwrighting and machinery and bridge and architectural work. All the main brick buildings of the establishment stand thereon. These are the main shop, 192 feet by 56 feet, with a wing 44 feet by 60 feet; the centre building, about 51 feet by 75 feet; the foundry, 150 feet by 86 feet; the pattern-house, 60 feet by 29 feet; the blacksmith-shop, 42 feet by 87 feet; the boiler-house, about 32 feet by 20 feet, and the engine-house, 18 feet

Watson v. Watson Manufacturing Co.

by 34 feet. The receiver being advised and being of opinion that the two steam-engines and boilers, two blowers, two cupolas, some radiators, the shafting and a platform scale, which were in the establishment, were personal property, applied for and obtained an order directing him to sell those articles with other property, unquestionably personal, of the company. The society and the bank now apply to vacate so much of that order as directs him to sell the articles above specified, on the ground that they are part and parcel of the realty.

One of the engines is in the engine-house above mentioned, which is connected with the main building. It weighs, with the fly-wheel, about eight tons, and was put in to drive the machinery of the works. Its power is, high pressure, eighty horse-power; low pressure, one hundred. It is set on a foundation and is held in its place by "holding-down bolts." The engine-shaft extends through the wall of the main building, the wall forming a foundation for the journal-box on the end of the main shaft. The boilers of that engine are two in number and weigh about four tons each. They are in a building on the premises occupied by them alone, and built against the main building. The rear of that building was built up after they were put in. They are bricked over. The power is communicated to the works by the following means: On the extreme end of the engine-shaft is a gear-wheel working into a corresponding wheel on an upright shaft, on which latter shaft are placed wheels at the respective heights of each of the three stories of the building. On the end of the line-shafting in each story are placed wheels which work into the wheels on the upright shaft. The first two or three lengths of line-shafting in each story are run on hangers attached to the floor-beams of the building by bolts, and the rest are held in place on the cast-iron columns which support the floor and roof of the building, a flat surface having been left on the columns for the purpose, and the journal-boxes being secured by screws.

Watson v. Watson Manufacturing Co.

The cupolas are circular shells of wrought-iron, lined with fire-brick, are about four feet in diameter for about fifteen feet, and then become narrower, in the shape of a funnel, with the small end upwards. To the top is attached an iron pipe which extends through the roof. They stand on foundations built in the ground. The cranes (they will each carry about ten tons) rest on stone foundations in the centre of the foundry, on which there is a cast-iron step which receives the pivot on which the crane swings, and the upper end of the mast of the crane is held in a cast-iron journal-box bolted to the main rafters of the building.

The platform scale is in the centre building. It is set in a pit of brick work about three feet deep. It was put in to weigh the goods. The radiators are what are known as "Mason radiators." They are connected with the building by steam-pipes, and are attached to the floor by screws to keep them in place. They were put in to warm the building.

The other engine (of about fifteen horse-power) is said to be substantially set, fixed on mason work and held down by bolts, and was for driving the machinery of what is called "the erecting-bridge shop." No evidence is offered as to the blowers.

That all of the articles in dispute were put into the buildings to remain there permanently so long as they were serviceable, there can be no question. It is distinctly proved. They were all necessary to the business there conducted. They were all attached to the realty or something appurtenant thereto, there to remain for the purposes of the business for which the premises were designed and to which they were accordingly adapted. They are of far more value on the premises than they would be if severed from them. For example, the cupolas cost together about \$1,000. Taken from the building they would not sell for more than \$200, it is said. The main engine and its fixtures cost \$7,500, though bought at second-hand. To the premises they are worth for any purpose to which the property would probably

Watson v. Watson Manufacturing Co.

be applied, \$2,500. Separated they would not sell for more than \$1,500. Apart from injury to the buildings in the removal, to take these articles out of the buildings would dismantle them and take away from them the essential adjuncts which were placed there in order to adapt them to the purposes for which they were built and used, and which, without them, they would not answer. The articles are to be regarded as part of the realty. *Quinby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260; *Williamson v. N. J. South. R. R. Co.*, 2 Stew. 311; *Kere v. Paxton*, 11 C. E. Gr. 107; *Bliss v. Whitney*, 9 Allen 114; *Arnold v. Crowder*, 81 Ill. 56. That it was intended that the articles in question should be permanent accessions to the freehold, will admit of no doubt. Nor does the fact that the owners dealt with them as personal property in their accounts and in insuring them, and that the assessors, in taxing them, treated them as personal property, control the question. Whether they are to be regarded as personal or real, is to be determined by the following considerations: Whether they are actually annexed to the realty or something appurtenant thereto; whether they are applied to the use or purpose for which that part of the realty with which they are connected is appropriated, and whether the party making the annexation intended to make thereby a permanent accession to the freehold. *Williamson v. N. J. South. R. R. Co.*, *ubi supra*. But it is urged, on the part of the receiver, that there was no unity of title in the land and the articles in question until long after the mortgages of the society and the bank were made; that the mortgage of the former was given by William G. and James Watson, who then had the legal title to the land, but who never owned the articles in dispute, but they were owned by the Watson Manufacturing Company; and that the mortgage to the bank was given by the Watson Manufacturing Company, which then had no title to the land, but did own the articles. The fact is, however, that there was essential unity of title. The company was the equitable owner of the land, and in possession of it accordingly, when both mortgages were made. *Cooke v. Watson*, 3 Stew. 345.

Williamson v. Fox.

JENNIE WILLIAMSON

v.

MAHLON FOX and others.

F. gave a mortgage to W., who assigned it to J. and E. While J. and E. owned it, F. purchased of the payee a note made by E. F. sold the premises to P., on February 28th, 1878, deducting the amount of the note from the mortgage, as part of the purchase-money. E. assigned her interest in the mortgage, on April 11th, 1878, to J. On foreclosure by J., and prayer for deficiency against F.,—*Held*, that neither F. nor P. was entitled to set off the amount of the note against the mortgage.

Bill to foreclose. On final hearing on bill and answers of Mahlon Fox and Peter R. Williamson, and agreement of counsel that cause be heard on bill and answers and briefs.

Mr. P. W. Cross, for complainant.

Mr. M. Wyckoff, for answering defendants.

THE CHANCELLOR.

The mortgage in suit was given by Mahlon Fox to Catherine Williamson. He subsequently, on the 28th of February, 1878, conveyed the mortgaged premises (except a part which had been previously conveyed away and released from the mortgage) to Peter R. Williamson, who now owns them. Catherine Williamson assigned the mortgage, on August 15th, 1876, to her daughters Jennie (the complainant) and Electa. Electa assigned her interest in the mortgage to the complainant, on the 11th of April, 1878. While Fox was the owner of the premises, he, on the 8th of April; 1877, purchased from Martin Wyckoff a promissory note for \$100, made by Electa, dated November 4th, 1872, and payable one day after date, and it was then endorsed by Mr. Wyckoff to him, accordingly. Electa was then an equal

Williamson v. Fox.

owner of the mortgage with her sister, the complainant. When Fox sold to Peter R. Williamson, he represented that there was due on the mortgage, of principal money, only \$472, claiming credit on the mortgage for the amount of the note, and Williamson paid the rest of the purchase-money. Fox says he is insolvent, and alleges that Electa is so, also.

Fox and Peter R. Williamson insist that they have a right to offset the amount due on the note against so much of the money due on the mortgage, and the former also insists that, in making up the amount of any decree for deficiency against him, he is, at all events (the decree for deficiency being personal, and in respect of his liability on the bond), entitled to the offset. On this latter point it is enough to say that the bill does not specifically pray a decree for deficiency against him, and, therefore, under the statute and the 38th rule of this court, there can be none. It is thoroughly established in this court that, in a suit for foreclosure, the mortgagor or his assigns will not be permitted to set off any demand against the mortgage debt, except payment, which operates as a release of the encumbrance *pro tanto*, or an agreement that the sum proposed to be set off should be received and credited as payment. *Adm'r of White v. Williams*, 1 Gr. Ch. 376; *Dolman v. Cook*, 1 McCart. 56; *Bird v. Davis*, *Id.* 467; *Williams v. Doran*, 8 C. E. Gr. 365; *Dudley v. Bergen*, *Id.* 397.

In this case it is not claimed that there was any agreement that the amount of the note should be allowed on account of the mortgage debt. Indeed, it appears that the note was purchased by Fox long after it was due, and entirely of his own accord, and with a view to offsetting it against so much of Electa's interest in the mortgage. It is not a debt contracted by her with him, but one which he obtained by purchase. It is urged by defendants' counsel that the complainant became the assignee of Electa's interest in the mortgage in order to defeat Fox's offset. But, in the first place, the answers by no means show that that was

Grassmann v. Bonn.

the reason for the assignment, and, in the next place, if Electa had not assigned, and were herself prosecuting the foreclosure with her sister, the note, according to the authorities cited, could not be offset against her interest in the mortgage in the suit. The principles of set-off do not apply to suits for foreclosure. It is insisted, also, that the fact that Electa and Fox are both insolvent, will, of itself, induce this court to allow the offset. But the reason on which the cases above cited are founded is not affected by the consideration of insolvency. That reason is, that the proceeding is *in rem* and not *in personam*. And again, the claim is a separate debt, while, if Electa were still owner of the mortgage, with her sister, the mortgage debt claim is joint, and the offset must, on that ground, in this case be denied. *Robbins v. McKnight*, 1 Hal. Ch. 642. In that case, though the court did not decide the question whether insolvency would be good reason in equity for allowing the offsetting of a separate debt against a joint one, they appear to have been inclined to the opinion that it would not. The suit, however, was not for foreclosure, but for specific performance of a contract.

There will be a decree for complainant, in accordance with these views.

EDWARD GRASSMANN, assignee, &c.,

v.

JOHN H. BONN and others, commissioners.

Certain commissioners, authorized by statute, made a contract for the improvement of a public road, with M. & N., who gave sureties for its faithful execution. Afterwards, with the commissioners' approval, M. assigned his interest to N., who, before the work was finished, made an assignment to G. for the benefit of his creditors. The sureties of M. & N., by a subsequent, independent contract with the commission-

Grassmann v. Bonn.

ers, completed the work. By the original contract it was provided that so much of the money due the contractors under it as might be considered necessary by the commissioners, would be retained by them until any suits or claims against them for damages or for arrears in payment to workmen, or for material furnished, should have been settled and evidence to that effect furnished to the commissioners. G. filed a bill against the commissioners for an account, discovery, etc., to which they put in a demurrer, because the sureties of M. & N., and also persons holding claims against N. for labor or materials furnished on the work, had not been made parties.—*Held*, that none of them being necessary or even proper parties, the demurrer should be overruled.

Bill for account, &c. On demurrer, for want of necessary parties.

Mr. R. Gilchrist, for demurrant.

Mr. J. W. Vroom, for complainant.

THE CHANCELLOR.

The complainant, assignee of Thomas H. Niven, files his bill against the defendants, commissioners under an act of the legislature, approved April 4th, 1872 (*P. L.* 1872, p. 1379), for the improvement of Bull's Ferry road, in Hudson county, and its various supplements, for an account, with discovery and other relief incident thereto. The commissioners were authorized by law to widen and improve the road and to contract for the work of improvement. They accordingly made a contract in writing, on the 7th of November, 1874, with Thomas H. Niven and John A. Middleton, to do certain work of improvement mentioned therein. Middleton, on or about March 1st, 1875, assigned all his interest in the contract (the work under which had been partly done) to Niven. The commissioners, on the 13th of April, in the last-mentioned year, agreed to the assignment, releasing Middleton and accepting Niven as sole contractor, and agreed to pay him the compensation fixed and stipulated

Grassmann v. Bonn.

for in the contract for the work. Niven proceeded with the work but did not finish it, and on the 28th of December, 1875, assigned all his property to the complainant for the equal benefit of his creditors, under the act "to secure to creditors an equal and just division of the estates of debtors who assign to creditors." Subsequently, and on the 26th of January, 1876, the sureties of Niven and Middleton made a contract with the commissioners to complete the work and otherwise perform the contract on which they were sureties. They completed the work to the satisfaction of the commissioners, but at the time of filing the answer, the year after completion for which they were bound by the contract to keep the road in good order had not expired.

The answer states that there are a great number of persons who claim that the commissioners should pay, out of the funds claimed by the complainant, large sums of money for labor or materials, on or for the work, or for supplies furnished in connection therewith, by virtue of some lien which they insist exists thereon in their favor, and the question is raised by the answer, and is now submitted for decision as on demurrer, whether those persons and the sureties should be made parties to this suit.

By the contract, it was provided that so much of the money due the contractors under it as might be considered necessary by the commissioners, would be retained by them until any suits or claims against them for damages or for arrears in payment to workmen, or for material furnished, should have been settled, and evidence to that effect furnished to the commissioners.

This action is for an account and payment of the amount which may be found to be due. It is not claimed by the commissioners that any lien upon the money due the contractor under the contract exists as against them or the work, by virtue of any provision of statute law, nor that any assignment by draft or order or otherwise has been made by the contractor of the money claimed by the complainant,

Forman v. Bulson.

or any part of it, unless the above-mentioned provision has the effect of an equitable assignment. That provision was probably intended for the indemnity of the commissioners against suits or claims for wages, or the price of materials, which, though unmaintainable, might nevertheless be brought against them, and to guard against contingencies, such as malicious injury to the work in revenge for non-payment of wages, which might otherwise arise from the failure of the contractors to meet their obligations to laborers on or venders of materials for the work. It does not create a lien in favor of such persons. It gives merely the right to retain money until the claims shall have been settled, and proof to that effect shall have been given to the commissioners. It was intended as a means of coercion, of compelling the contractors to pay their debts, contracted in connection with and for the work. The commissioners are charged with no duty towards those to whom such debts are due, by reason of it. Whether they would retain or not was entirely at their option. The provision does not render them liable at law or in equity for the payment of those debts. Nor is the provision an equitable assignment on the part of the contractors of so much of the fund as may be necessary to pay such debts. The persons holding such claims are therefore not necessary, nor would they be proper, parties to the bill. So, too, in regard to the sureties. They have finished the work under a contract with the commissioners, and look to the latter for compensation under their contract.

HENRY C. FORMAN

v.

GILBERT BULSON.

The fact that the evidence to prove a deed, absolute on its face, defeasible, is very conflicting, and that the conclusion that it was

Trustees for Support of Public Schools *v.* N. J. West Line R. R. Co.

merely a mortgage was reached only by the preponderance of the evidence, is good reason for adhering to the general rule that the mortgagee is entitled to his costs on a bill to redeem.

Bill for relief. Question of costs.

Mr. A. Browning, for complainant.

Mr. A. Hugg, for defendant.

THE CHANCELLOR.

This is a suit to redeem. The general rule is, that a mortgagee is entitled to his costs, both on bill to redeem and foreclose. There is nothing in this case to take it out of the rule. The conclusion that the deed was a defeasible and not an absolute one, was reached not without difficulty. There was evidence both in favor of and against it. The preponderance appeared to be in favor of it. This matter of costs was reserved till the final decree, by the interlocutory decree of July 17th, 1875. I am informed by the master who heard the case for me, that it was disposed of on the final hearing favorably to the defendant. It did not appear, when the matter was heard by me, that it had been decided by him. After consideration of the subject, I concur in his opinion.

The complainant should pay costs.

THE TRUSTEES FOR THE SUPPORT OF THE PUBLIC SCHOOLS

v.

THE NEW JERSEY WEST LINE RAILROAD COMPANY and others.

A sheriff was directed by complainants' solicitor to stop the advertisement of a sale under foreclosure, because an injunction restraining such sale had issued out of a federal court. The sheriff nevertheless

Trustees for Support of Public Schools v. N. J. West Line R. R. Co.

continued to adjourn the sale from week to week for nearly three years, no notice of such adjournments being given, or required to be given by statute, in any newspaper. After the injunction was dissolved, and without any further or other notice to subsequent encumbrancers or other parties in interest, he sold the premises, realizing an amount far below their value.—*Held*, that the sheriff's action in the adjournments could not, under the circumstances, be regarded as a substantial compliance with the statute, and that there was such surprise on the parties interested, by reason of want of notice, and such consequent injury to their rights, as justified the court in setting aside the sale on terms.

Bill to foreclose. On motion to set aside sheriff's sale. On petitions and affidavits.

Mr. F. T. Frelinghuysen and *Mr. B. Williamson*, for petitioners.

Mr. B. Gummere, for complainants.

Mr. T. N. McCarter, for the purchaser.

THE CHANCELLOR.

Francis S. Lathrop, receiver of the Central Railroad Company of New Jersey, and William Z. Larned, receiver of the New Jersey West Line Railroad Company, by their petitions, pray that the sale made by the sheriff of Hudson county, under the execution for the sale of the mortgaged premises in this suit, may be set aside, on the ground of surprise.

The property is a tract of land, and land under water, of more than one hundred acres, known as the "West Line Tract," in Communipaw Cove, in Hudson county, and is said to be of very great value, very far beyond the amount (\$123,000) at which it was sold by the sheriff.

The receiver of the West Line Company was interested in the property, because the title to it was in his company, which was the mortgagor. Mr. Larned was also interested as the holder, as executor, of encumbrances on it subsequent

Trustees for Support of Public Schools *v.* N. J. West Line R. R. Co.

to that of the complainants, amounting to more than \$25,000, and, as executor, he was the holder of bonds of the West Line Company to the amount of \$460,000. The receiver of the Central Railroad Company was interested as the holder of bonds to the amount of \$900,000. The execution was issued on or about the 19th of November, 1875. Under it the sheriff advertised the property, the sale to take place in January, 1876, and from that day he, as he says, adjourned the sale from week to week up to the time when the property was sold, December 26th, 1878, a period of nearly three years.

About the 5th of May, 1876, the solicitor of the complainants, then attorney-general of this state, was informed that a suit had been instituted in the United States circuit court for the district of New Jersey, by John Taylor Johnston, in which an injunction staying the proceedings in this suit was issued. It appears that soon after he obtained that information, and while the injunction was in force, and in view of it, he directed the sheriff to discontinue the adjournment. The injunction was not dissolved until the 30th day of November, 1878. He supposed that his instructions had been obeyed, and that the adjournment had been discontinued, and that new advertisement would be necessary. So, also, did his successor, the present attorney-general, who represented the complainants in the suit in the federal court, on the application to dissolve the injunction. When the order dissolving the injunction was made, he said, in the presence of the counsel of Mr. Johnston, who were, also, of counsel with the receiver of the Central Railroad Company, that the adjournment had been discontinued.

After the injunction was dissolved the complainants' solicitor directed the sheriff to re-advertise the property, but was informed by the latter that it would be unnecessary, because he had continued the adjournments. He thereupon directed that the sale take place, and it took place accordingly.

Trustees for Support of Public Schools v. N. J. West Line R. R. Co.

To consider the merits of this application: It is said that the petitioners have no substantial interest in the sale. But, as before stated, the receiver of the West Line Company is interested, because his company is the owner of the equity of redemption, and Mr. Larned is interested, as executor, under the execution, and as a bondholder. It is urged that it does not appear probable that anything will be realized by him as receiver on a resale, because there is no evidence that the property will bring even the amount of the encumbrances. But the property is of very great value, and I cannot assume that, at a sale properly advertised, it will not produce more than the amount of the encumbrances. It is said, also, that it does not appear probable that anything will be realized for him as an encumbrancer on a second sale, because there are encumbrances of large amounts which are entitled to priority over his. But the priority of those encumbrances has not yet been established. The surplus, after paying the amount due the complainant, is ordered to be paid into court.

It is urged, also, that the receiver of the Central Railroad Company has no interest. What has been said in regard to the interest of the West Line receiver is applicable to him as the holder of bonds. He also claims to have an interest in the property by title superior to that on which the complainants' mortgage rests, but that title, if it exists, will not be affected by the sale, and, in that respect, the receiver is a stranger, and, therefore, cannot intervene to set aside the sale. It will be sufficient, however, for the purposes of this motion, to consider the question, in view of the standing which the West Line receiver undoubtedly has. On the 25th day of July, 1878, he was about to sell the interest of his company in the property (and his title is that under which the complainants' mortgage was given), when his proceedings to that end were stopped by this court, of its own motion, by an order of that date. That action on the part of the court was induced by the consideration that the property was claimed by two insolvent corpora-

Trustees for Support of Public Schools v. N. J. West Line R. R. Co.

tions, the West Line and the Central, whose affairs the court was administering under the statute. There was good reason why the property should not be sold by the West Line receiver, subject to the deadening influence of an adverse claim upon the sale, and there was equally good reason why the court should not permit him to sell, as the property of the West Line Company, property claimed by the receiver of another trust estate in its hands. These prudential considerations induced the court to restrain him.

The object of the litigation in the federal court was to assert and protect the paramount title which the Central Railroad Company claimed to have to the property.

The West Line receiver subsequently asked leave of this court to take steps to intervene in that suit to protect the interest of his company. The leave was not accorded, because of want of funds, and the fact that it was supposed that the right of the West Line Company would be represented and defended by the complainants in this suit, in the protection of their mortgage. He subsequently, in November, 1878, again sought such leave, representing that the Lehigh Valley Railroad Company, which was largely interested as holder of bonds of the West Line Company, had agreed to indemnify him against the costs and expenses of his defence. The leave was then accorded to him. The injunction in the suit in the federal court was dissolved without his knowledge. It was dissolved on the ground that, not having been renewed, it continued only until the next term of the court after May 5th, 1876, when it was granted. The property was then put up for sale under the execution, and it was struck off to Mr. Hartshorn, vice-president of the Lehigh Valley Railroad Company, and treasurer of the Easton and Amboy Railroad Company, for (as he says) the latter company, at the price of \$123,000, the amount due the complainants on their mortgage.

If the sale stands, the interest of Mr. Larned in the property as receiver and executor is gone. The whole amount of the liens on the property will not exceed \$300,000. It is

Trustees for Support of Public Schools v. N. J. West Line R. R. Co.

alleged, and it is not denied, that a sum of money equal to more than twice the amount for which it was struck off has been expended in the reclamation of the property, and it would undoubtedly bring a very large sum beyond the price at which it was sold, if there were no question in regard to the title. The receiver of the West Line Company claims that his title is good, and that the claim made in the suit in the federal court against it is invalid. If the sale under the execution will indeed convey a good title, it is most manifest that the sale ought not, under the circumstances, to be permitted to stand. Obviously, I cannot assume that the adverse claim is good. But, irrespective of that claim, Mr. Larned, as receiver and executor, is entitled to the benefit of the provision of the statute for notice of the sale. It is quite clear that practically and substantially the sale took place without notice. There was indeed a compliance with the letter of the law, the sale was advertised, and it was adjourned from week to week (it is said) up to the day on which it took place. There was no advertisement of any of those adjournments in any newspaper (the law did not require that there should be any), and it is undeniable that no person in interest, not even the complainants' solicitor, had any knowledge whatever of the fact that the adjournments were being made. To say nothing of notice to the public to attract bidders, no notice was given to Mr. Larned that the sale was to take place. The sheriff says that he relied upon the complainants' solicitor to give notice to the parties in interest, because the solicitor had given him to understand that he would notify them; and he adds, that but for his reliance on the solicitor, and his belief that the latter had notified all the parties in interest, he would have notified the Central Railroad Company, the receiver of the West Line Railroad Company, and other parties who he knew were interested in the property, that the sale was to take place on the 26th of December, 1878. It is true the solicitor denies that there was any ground for such understanding on the part of the sheriff, and positively

Trustees for Support of Public Schools v. N. J. West Line R. R. Co.

denies, also, that he undertook to notify the parties interested in the property. But it is evident, at all events, that the sheriff supposed, however erroneously, that the West Line receiver and all others in interest were to be notified by the complainants' solicitor, and therefore did not himself notify them, as he would otherwise have done. The want of due notice constrains me to consider the sale an unfair one. The adjournments by the sheriff, after May, 1876, having been not only unauthorized but made against the directions of the complainants' solicitor, cannot, under the circumstances, be regarded as a substantial compliance with the requirements of the law. Adjournments so made for so long a period (about two years and a half), in the presence of none of the parties, not even with the knowledge of any of them, and of which no notice whatever is given to any one, cannot be held to be more than a mere compliance with the letter of the law. It is manifest that the object of the statute in requiring notice was not answered. Practically, it was precisely as if no notice had been given.

While it is the duty of the court to uphold judicial sales fairly conducted, and to give to purchasers thereat the benefit of their purchases, it is no less its duty to see to it that the defendant in execution has the benefit of that important provision for notice which the law has made for his protection. *Cummins v. Little*, 1 C. E. Gr. 48.

It may be added that, in view of the action of the court before mentioned, in restraining the West Line receiver, the sale may justly be regarded as a surprise upon the court itself.

The sale will be set aside on such terms as to protect the complainants against loss on a resale of the property, and to indemnify the purchaser for loss of interest on the percentage paid by him, and his costs of this application.

It will, therefore, be ordered that, if the petitioners, or one of them, furnish bond (not to be signed by either of them, however, as receiver) that the property on a resale shall bring the amount then due the complainants on the execution,

Pine v. Shannon.

with costs of both sales, and pay to the purchaser interest on the percentage (which of course is to be repaid to him) paid to the sheriff on the sale, with his costs of this application, the sale will be set aside. It was urged, on the argument, that if the sale be set aside the complainants will thus lose the benefit of recourse to Asa Packer, who, they claim, is surety for the West Line Railroad Company on their bond, to secure which the mortgage foreclosed in this suit was given. But if the sale be set aside by the court for no fault of the complainants, no such consequence could be visited upon them. The purchaser is not lost through their default, nor are they chargeable with the loss. The security required on setting aside the rule will probably, however, obviate any question on this point.

LOUISA E. PINE

v.

JOHN SHANNON and others.

A plaintiff in attachment claiming a lien on a mortgage debt by virtue of his attachment, is a necessary party defendant to a bill to foreclose such mortgage.

Bill to foreclose. On general demurrer.

Mr. George Van Horn, for demurrants.

Mr. S. C. Mount, for complainant.

THE CHANCELLOR.

The question presented is, whether George Van Horn is, under the averments of the bill as amended, a necessary or proper party to the suit. A general demurrer to the bill in

Cairo & Fulton R. R. Co. v. Titus.

its original form was sustained (*Pine v. Shannon*, 3 *Stew.* 404) because of the lack of necessary averments. It is admitted that those averments have now been made by the amendments. Mr. Van Horn seeks, by the second demurrer, to call in question the propriety of making him a party to the bill. He is made a party because he has attached the mortgage debt in the hands of the mortgagor, under an attachment at law against the complainant and her husband, issued at his suit. He claims to have a legal lien on the mortgage debt, which he is seeking to enforce as against the complainant and the mortgagor. He is a necessary party. *Jones on Mortgages* § 1368. He is properly made a defendant. This question was substantially decided under the first demurrer.

The demurrer will be overruled, with costs.

THE CAIRO AND FULTON RAILROAD COMPANY

v.

TITUS AND SCUDDER.

A complainant sought to obtain a new trial in equity on the ground that the attorney of the plaintiffs in the suit at law (the defendants in this court) fraudulently concealed a written agreement, which, it was insisted, materially affected the plaintiffs' claim, to the great advantage of the defendants. It appeared that, before the suit was commenced, the plaintiffs' attorney handed the agreement to the defendants' attorney (not the counsel who tried the cause for them, however), for examination. It appeared, also, that the person who negotiated the transaction (an advance of money) which resulted in the agreement, and who made the agreement, and who professed to have been acting therein as the agent of the defendants, was a witness for the plaintiffs; that he was accessible to the defendants and their counsel, both before and at the time of the trial, but they did not examine him on the subject of the existence of the agreement, or of any such agreement. Such examination was to be expected, because the defendants claimed that in the transaction the witness acted for himself, and not for the

Cairo & Fulton R. R. Co. v. Titus.

defendants. It appeared, also, that there was no concealment on the part of the plaintiffs of the character of their demand.—*Held*, that, under the circumstances, the complainants had no claim to relief.

Bill for relief. On final hearing on pleadings and proofs.

Mr. T. N. McCarter, for complainant.

Mr. Joseph C. Potts and *Mr. C. Parker*, for defendants.

THE CHANCELLOR.

The ground on which relief is sought in this case, was fully stated in the opinion delivered on the decision of the motion for a dissolution of the injunction. *Cairo & Fulton Railroad Company v. Titus*, 12 *C. E. Gr.* 102. That motion was granted, but, on appeal, the order was reversed and the cause remitted to this court to be proceeded in. *Cairo & Fulton Railroad Company v. Titus*, 1 *Stew.* 269. Though the merits of the controversy, of course, were not involved in the decision of that motion, yet, both in this court and the appellate one, views bearing upon the decision upon the merits were more or less positively expressed. And it is claimed that the opinion of the majority of the court of errors and appeals was in direct contrariety to that of this court on the subject of the character and consequent importance in the cause of the agreement, the concealment of which is the burden of the complaint, and the ground on which a new trial in equity is sought.

To me it appeared, as it still does, quite clear that that agreement did not give to Dr. Guthrie an option to pay the \$5,000 and interest, in lieu of the delivery of the bonds in case the bonds were not issued within the year, but that the provision for such repayment was a mere guarantee on his part. It is quite unnecessary that those views, which are given at length in the opinion in 12 *C. E. Gr.*, should be reproduced here. Though they were not concurred in by

Cairo & Fulton R. R. Co. v. Titus.

the appellate tribunal, it is by no means clear that that court intended to be understood as rejecting them, and it will, perhaps, most truly express their position to say that they did not adopt them. Their language is: "The present appeal does not involve the merits of the controversy between the parties. The only question is, whether sufficient equity is shown to justify the court in holding the injunction until the final hearing of the cause. Was the newly-discovered evidence material to establish the complainants' defence to the action at law, and could they, by the exercise of due diligence, have discovered the same in time to avail themselves of it upon the trial?"

"The alleged newly-discovered evidence consists of a written agreement between Guthrie and Titus & Scudder, relative to the subject matter of the controversy between the parties, a discovery of which was prayed in the bill, and which is set forth in the defendants' answer, and of the existence of which the complainants allege themselves to have been entirely ignorant until a few days previous to the filing of their bill."

"It cannot be doubted that this agreement was very important evidence on behalf of the complainants, and material to their defence of the suit. It sets forth the terms of the negotiation between the parties, and, while it is not now necessary to discuss its meaning, or to settle its true construction, about which counsel widely differ, it is sufficient to say that it lay at the very foundation of the controversy; that the cause could not have been fairly and fully tried without it; that, if produced, it must have received the serious consideration of the tribunal before which the cause was tried; and that, by it, the result of the trial might, and probably would, have been changed or materially modified."

In my judgment, it would be unjust to that court to give to this language, under the circumstances, the weight of a final adjudication upon the construction of that instrument. They merely adjudged that the injunction should be held

until the final hearing. It is not, however, designed to put the decision of this cause upon any ground which shall even seem to contravene the views or the intimation of opinion of that court. Conceding that the agreement was important testimony for the complainants on the trial at law, the question remains, whether they are shown to be entitled to any relief here because of its non-production, or the omission on the part of Titus & Scudder to communicate to the complainants' counsel at that time the fact of its existence, so that they might have availed themselves of it as evidence in their favor. Said the court of appeals: "They are not now entitled to the benefit of this evidence, or to any equitable interference with the judgment, if there has been negligence or laches on their part. If this evidence might have been discovered by the exercise of ordinary diligence on the part of the complainants, in time to be available at the trial of the cause, they are not entitled to relief." It is hardly necessary to remark that a new trial in equity cannot be had merely under cover of equitable grounds for it, but the equitable grounds must be shown to exist, and whether the relief will be granted depends upon them, and upon them alone.

The only ground for relief in this case is the agreement. The bill alleges that, if produced, it would have shown that the company were not liable to Titus & Scudder at all, or, if liable, it was only to the amount of \$5,000 and interest; that the right of redemption was secured to them by the agreement.

It is a most important question, then, whether the company might, but for their inattention or negligence, or that which is attributable to them, have availed themselves of it. If this question be decided adversely to them, their case in this court fails utterly. What, then, is the proof? When Mr. Ashbel Green, the attorney and counsel of the company, called upon Mr. Potts, who was the attorney of Titus & Scudder and had the claim in his hands for collection, on the 25th of September, 1871, Mr. Potts mentioned the claim

Cairo & Fulton R. R. Co. v. Titus.

to him. Mr. Green, according to Mr. Potts's testimony, asked what the claim was; and Mr. Potts, as he swears, took from the safe three papers (the two acceptances and the agreement) and handed them to Mr. Green. He says that Mr. Green stood with them in his hands two or three minutes, apparently reading them, and then asked him "what the claim could be settled for;" to which Mr. Potts replied, "for the principal, \$5,000, with interest from the date of payment;" that Mr. Green asked what it would amount to; to which Mr. Potts replied, that as the money was paid by installments at different dates, it would require a little calculation to make up the amount, and Mr. Green told him to make the calculation and drop him a line, calling his attention to the matter and giving him the amount, so that he might lay the matter before Mr. Marquand. On the next day, September 26th, 1871, Mr. Potts wrote and sent to Mr. Green the letter which is set out in the complainants' bill, in which he said that the claim of Titus & Scudder against Dr. Guthrie amounted to \$6,207.52 (principal and interest due September 30th, 1871), for which they held the acceptance of the Cairo and Fulton Railroad Company by Mason Brayman, president, for twenty-five bonds, first mortgage land grant, each \$1,000, and added a request that Mr. Green would inform him whether a settlement of the claim could be made. The testimony of Mr. Potts, that he showed the agreement at his office on the occasion above mentioned, to Mr. Green, is not contradicted. Mr. Green merely says that the paper was not shown to him by Mr. Potts, on that occasion, to his recollection. He also says, that he does not recollect ever to have seen it, and has no recollection of ever having heard of it, until some time after he was informed that proceedings had been instituted in Missouri on the judgment. But Mr. Green also says, that he has no recollection of any mention having been made to him at that time of the claim of Titus & Scudder; that Mr. Potts mentioned to him some claim against Dr. Guthrie, but he cannot, at this distance of time, undertake to say

who held it. He swears, indeed, that at the time when he procured the entry of the appearance of the company to the suit brought by Titus & Scudder, he had no knowledge of the contents or existence of the agreement—but that does not contradict the testimony of Mr. Potts. Mr. Green has no recollection of ever having seen the letter above mentioned until about the time of the commencement of this suit, but no doubt is suggested that it was sent to him on the 26th of September, 1871. It came to Mr. Marquand from the office of Mr. Green's law firm, a long time afterwards, among other papers pertaining to the railroad company's business sent from there. But, further, Mr. Marquand says, in his testimony, that he thinks that in September he heard directly from Mr. Potts, or from Mr. Green after his interview with Mr. Potts, that Titus & Scudder had a claim against the company. He says that was what induced him to make inquiries about it from the officers of the company, and he says that the president and attorney said: "We know about that; that is a private matter of Guthrie's; the company have nothing to do with it." He acknowledged service of the writ on the 28th of November, 1871. So that, before the suit was commenced, he knew that the president and attorney of the company not only professed to be fully acquainted with the claim which Titus & Scudder made against the company, but professed to be satisfied, not only that it was no valid claim against the company, but that it was a mere private claim of Dr. Guthrie's.

Again, there is not the slightest ground for any claim that there was either misrepresentation or concealment on the part of Titus & Scudder. The letter of September 26th, 1871, refers to the claim as a claim against Dr. Guthrie, and mentions the acceptances. Here is surely evidence that the claim against the company was presented without concealment. According to Mr. Marquand, the president and attorney both knew the character of the claim, and not only denied that there was any liability on the part of the company in respect to it, but declared that it was merely a pri-

Cairo & Fulton R. R. Co. v. Titus.

vate debt of Dr. Guthrie's. With this knowledge and the information derived from the acceptances themselves, the company came to the trial. Their counsel asked no question of Dr. Guthrie about the agreement. Dr. Guthrie, on the trial, testified that he borrowed the money for the company. Their counsel says that Dr. Guthrie told him before the trial that the acceptances were the only thing fixing liability on the company, and yet he refrained from cross-examining him on the subject. He gives no reason for this, but says that it is difficult for him, at this time, to say what his reason was, though he had a reason that was satisfactory to himself at the time; that he had other relations with him, &c. The suit was against the company, to recover the value of the bonds, and a count had been added to the declaration with a view to the admission of proof that the money was borrowed for the company.

Guthrie appears to have been accessible to the counsel of the company before the trial, and they appear to have conversed with him on the subject of the transaction with a view to the defence. Moreover, the company, though they postponed the trial because of the absence of Brayman at the previous term, do not appear to have made any effort to obtain his presence or his testimony. On this point the counsel who tried the cause for the company says he cannot now tell why the testimony of Brayman was not procured.

But further: On the trial Dr. Guthrie testified that the orders for the bonds (the acceptances), which called for bonds to be issued under a contract, were put in that form without consultation with Titus & Scudder, or anybody else. He says: "The order was worded in this manner to avoid the necessity of acknowledging that the Cairo & Fulton Railroad Company were selling its bonds at that price, but that I myself, as an individual, took the responsibility of having sold those bonds, although it was for the company, and the money was used by the company; but it was not desirable that the Cairo & Fulton Railroad Company should be recognized and known as having sold the bonds at so

Cairo & Fulton R. R. Co. v. Titus.

very low a figure, and to avoid this that order was drawn to refer to a contract that was even then abrogated." To the suggestion, by way of question, "It did not refer to the bargains between you and Titus?" he answered: "Simply for prudential reasons; for the interest of the company it was not desirable to acknowledge that we were selling any bonds or had sold any for the company." He then said the contract was afterwards abrogated. It would seem to have been very much a matter of course for the counsel of the company to have inquired, in cross-examination, as to the evidence of the agreement between the witness and Titus, with whom the negotiation was conducted in behalf of his firm. On cross-examination, Guthrie said: "Whether Titus approached me with regard to these bonds, or I him, I am not able to say, but the question was mooted between us as to the value of the Cairo & Fulton bonds prospectively, and as to my authority to dispose of a certain quantity of those bonds for money; that negotiation was carried through, and an agreement made that I was to receive from them \$5,000, for which they were to receive from the Cairo & Fulton Railroad Company, in due course of time, twenty-five of the first mortgage bonds of the company on an issue of \$5,000,000; that money was paid to me (my memory is) in three installments, but I have no papers with me to verify that fact, but the whole \$5,000 were paid to me, and the order upon General Brayman was given as a guarantee for the delivery of the bonds to them."

Again, it would seem that an inquiry as to the evidence of the agreement here mentioned would have been natural, but no such inquiry was made. On the other hand, inquiry was made of the witness as to what he said to Titus in reference to the necessities of the company as to the money, to which he replied that he told Titus, in general terms, that he (Guthrie) and Brayman, had each spent a great deal of money for the company, and that the company were in necessitous circumstances, and needed the means to publish maps, to get out prospectuses, to publish pamphlets, which

Cairo & Fulton R. R. Co. v. Titus.

they were then using in an endeavor to carry their line through Texas to the Mexican line, by additional aid from congress; that they had re-organized the company out of funds of their own, mostly Guthrie's, and had paid the expenses of the meeting of the board of directors from time to time. To the question: "Was the money you received of Titus part of the money returned to you for money advanced?" he replied: "Some, a small part of it, was paid to me for my advances and my salary; most of it was used for the affairs of the company at Little Rock and New York, and part of it, I remember now, went for the recovery of the papers and books of the company, which were found in Texas by an agent we sent for them; they had been carried off by the confederate government during the occupancy of Little Rock." And, in this connection, it may be remarked that the letter of June 6th, 1871, from Brayman to Guthrie, corroborates the latter, and goes very far towards showing that the transaction was, indeed, in behalf of the company, and was understood by Guthrie and Brayman to be a sale of the bonds of the company by the company without reference to the contract, and that the company had the proceeds and benefit of the transaction. The proof also shows not only that bonds to a very large amount were issued to the contractors under the contract, but that Dr. Guthrie received from the company bonds to the amount, at their par value, of \$35,000, for his interest in the contract. And it shows, further, that the rights of Titus & Scudder, under the acceptances, treating them merely as orders drawn by Guthrie on his own account, and not in behalf of the company, were entirely ignored.

The bill will be dismissed, with costs.

Farrell v. Richards.

WILLIAM E. FARRELL and others

v.

AUGUSTUS H. RICHARDS.

The right of every riparian owner to use the water flowing through his land for its proper irrigation, is subject to the limitation that his use for that purpose must be such as not essentially to interfere with the natural flow of the stream, or essentially and to the material injury of the proprietors below to diminish the quantity of water that goes to them.

Bill for relief. On order to show cause, heard on bill and affidavits on both sides.

Mr. S. H. Grey, for complainants.

Mr. H. Richards, for defendant.

THE CHANCELLOR.

The bill is filed by the owners and lessee of the property in Atlantic county long known as the Pleasant Mills, but now, also, as the Nescochague Mills, against Augustus H. Richards, to restrain him from diverting, to the damage of the complainants, as owners and lessee of the mill property, a stream known as the Forge stream, by which one of the two ponds of the complainants, known as the Forge pond, is supplied with water. From that pond the other, called the Pleasant Mills pond, and on which their mills are, draws part of its supply; and the mills, which are driven by water-power, depend wholly on the ponds for their power. The two ponds are connected by a ditch or canal. This connection between the ponds, and the use of the water in both of them to drive the machinery of the mills, have existed for over fifty years, though there was an interval of about ten years from the time when the mills were

Farrell v. Richards.

burned to the time when they were rebuilt (which was in or about 1860) when the mill site was not used.

The defendant, by various conveyances to him from the year 1858, has become the owner of a large tract of land, of about two thousand five hundred acres, extending from the head of the Forge stream up and along that stream for about three miles and a half. This property, or a considerable part of it, is used by him for the production of cranberries. In 1876 (according to the evidence it was probably in the summer and fall), he dug a large ditch, extending from the upper part of that tract to the Forge pond. His object in digging the ditch was, to irrigate his land. He also, at the same time, for the purpose of diverting the water of the stream into the ditch, constructed, with stones, brickbats and pieces of fence-rails driven into the bottom of the stream by way of piling, a dam in the stream. He and his witnesses say that it extended only partially across the stream; but some of the complainants' witnesses testify that it is entirely across the main body of the stream.

In the summer of 1877, the complainants, William E. Farrell (he is the owner of two undivided thirds of the Pleasant Mills property) and Lucius H. Warren (lessee of the other third), were operating the mills as partners. They then, in the month of August, perceived a sudden and very considerable diminution of their water-power, which was found to be due to the decrease of the water in the Forge pond. The season being an unusually wet one, and they being unable to account for the diminution of the water, set on foot investigations which resulted in the discovery of the existence of the dam and ditch. The ditch was then found to be draining the water from the Forge stream in large quantities. In January, 1878, they filed their bill in this cause for relief, praying that the defendant may be restrained from interfering in any way with the natural and ancient flow of the water down the Forge stream, and from storing or retaining the water of the stream, and that the dam built by him, or so much of it as may be found to

Farrell v. Richards.

interfere with the natural, ancient flow of the water in the stream, may be decreed to be a nuisance. They show, by the bill, a case of irreparable injury. On the filing of the bill, an order to show cause why an injunction should not be issued was made, and under it numerous affidavits were taken on both sides, which have been read without objection.

The defendant resists the application for an injunction principally on the ground that, in 1858, when he purchased part of his land, the owners of the mill-site were not using, and had not for several years previously thereto used, the water of the Forge pond for the production of power, and did not resume the use of it for that purpose until two or three years after he purchased his land, and after he had begun the cultivation of cranberries thereon, and expended his money in adapting his land thereto; that the diminution of the water is, in fact, but slight and immaterial, and that there is no actual loss of power, but an apparent one only, which is due to the fact that the complainants, Farrell and Warren, have put into the mills more and heavier machinery, requiring greater power to operate it than that which was formerly in the mills; that the complainants have raised the dam of the Forge pond; that the dam &c. are leaky, and waste the water; and that the defendant has the right to the water which he takes for the purpose of irrigation, for which purpose alone he diverts it; and that, after using it, he returns all the surplus to the Forge pond; and that, by means of some ditches which he has dug through his land, more water is contributed to the pond than the defendant uses from the Forge stream in irrigating his lands.

It appears to be established by the affidavits, that the complainants' mill-site has existed for about half a century; that it has been used as such for all that time, except the period of about ten years before referred to; that the connection between the two ponds has existed since 1827, and that the defendant constructed the dam and ditch of which complaint is made.

Farrell v. Richards.

The dam was constructed by the defendant, not on his own land, but on the land adjoining his above, and the ditch commences on the latter land. According to the defendant's testimony, the ditch is five or six feet wide. Its capacity for withdrawing the water from the stream appears by the testimony of an engineer, sworn on behalf of the complainants. He testifies that, in his opinion, there passed through it, on the 7th of August, 1877, the day on which the investigation into the cause of the decrease of the water in the Forge pond was made, about twelve hundred gallons a minute. That it was capable of such diversion of the water is not denied. Indeed, it appears, by the testimony of the engineer employed by and sworn for the defendant, that on the 1st of March, 1878, the quantity diverted was about eleven gallons a second, or six hundred and sixty gallons a minute. The last-mentioned occasion, it may be remarked, was one on which the witness was making measurements and calculations, to be used in behalf of the defendant in this suit, and it does not appear that the conditions were not favorable to the defendant, for it does not appear whether the gate was entirely up or not. The stream, at its entrance into the pond, is from twenty-five to fifty feet wide, and from three to five feet deep. The engineer before mentioned, sworn for the complainants, testifies that at least one-seventh of all the water used at the mills is by the dam and ditch diverted therefrom, and that the loss of power is in proportion one-seventh.

The evidence shows that the defendant constructed the dam and ditch in the summer and fall of 1876. The dam was made of material taken from the foundation of an old glass-works, and there appears to have been a very large quantity (a great many wagon-loads) of that material, stones and brickbats, thrown into the stream to make the dam. The evidence shows that it was built across the main stream (the stream is there divided by an islet, which, at high water, is overflowed), and on a sand bar. The proof is that, as soon as the ditch began to withdraw the water

Farrell v. Richards.

from the stream the effect was perceived at the mills, and in August, 1877, the effect was so great that the operations of the mills were seriously affected. These facts are conclusive as to the amount withdrawn, and the consequent injury to the complainants. The defendant has no right to so use the water as to diminish its quantity to the prejudice of the complainants. While every riparian owner has a right to use the water flowing through his land for the proper irrigation of his land, his use for that purpose must be such as not essentially to interfere with the natural flow of the stream, or essentially and to the material injury of the proprietors below to diminish the quantity of water that goes to them. 3 *Kent's Comm.* 439; *Merritt v. Parker, Coxe* 460; *Arnold v. Foot*, 12 *Wend.* 330; *Kauffman v. Griesemer*, 26 *Pa. St.* 407; *Miller v. Miller*, 9 *Pa. St.* 74; *Tyler v. Wilkinson*, 4 *Mas.* 400; *Embrey v. Owen*, 4 *E. L. & E.* 466; *Gillett v. Johnson*, 30 *Conn.* 180; *Blanchard v. Baker*, 8 *Me.* 253; *Colburn v. Richards*, 13 *Mass.* 420; *Anthony v. Lapham*, 5 *Pick.* 178; *Washb. on Easements* 300, 306; *Wood on Nuisances* 263.

Nor is there any ground of estoppel in the defendant's favor. That the mills were not in existence when he purchased his land, surely constitutes none, seeing that they had then been out of existence but about eight years. The right of the owners of the mill-site still existed. The defendant's expenditures, whatever they may have been, on his land, to adapt it to the cultivation of cranberries, were made with notice of their right. But if it had been otherwise, it would have given him no equity; that he, in fact, knew of their right appears from his affidavit, and it also appears, thereby, that he knew when he built the dam and constructed the ditch that he had no right to divert the water to their injury. He says, in his affidavit, that he well knew the ponds, and the mode in which the water was used at Pleasant Mills, and adds that he knew that the use he intended to make of the water of the Forge stream for irri-

Farrell v. Richards.

gation could not reduce the volume of the water at Pleasant Mills pond.

I do not deem it necessary to discuss the evidence. A careful consideration of it leads me to the conclusion that the defendant, by means of the dam and ditch, has withdrawn from the stream so much water as seriously to affect the complainants' water-power, and to do them irreparable injury. He still claims the right to divert the water, but insists that, in so doing, he does the complainants no injury, and causes no diminution whatever of the water in the pond. The evidence satisfies me that, by the withdrawal of the water, he not only causes diminution of the water in the pond, but diminishes it to such an extent as to cause very serious injury to the complainants. The complainants, when he began to divert the water, had enjoyed the unquestioned right of the water for over half a century. They are entitled to the protection of this court.

It was held in *Shields v. Arndt*, 3 Gr. Ch. 234, 245, that a long enjoyment by a party of a right will entitle him to restrain a private nuisance, even though the defendant may deny the right. See, also, *Carlisle v. Cooper*, 6 C. E. Gr. 576, 581.

According to the defendant's own testimony, the right now claimed by the complainants has been used by them, without interruption, since 1860, a period of seventeen years prior to the time when its enjoyment was interfered with by the defendant's dam and canal, and he not only does not deny that it has existed for the length of time claimed by the complainants, but substantially admits it. The complainants, and those under whom they claim, have, for a long time, been in the undisputed possession and enjoyment of the right with respect to which the complaint is made, and the acts of the defendant, which are the subject of complaint, were done recently, before the filing of the bill.

The defendant should be restrained from diverting the water and maintaining the dam. There will be an injunction accordingly.

Embury v. Klemm.

ABRAHAM B. EMBURY

v.

AUGUSTUS KLEMM and others.

1. A defendant applied to the court to open a decree for deficiency made against him in a foreclosure suit, the ground of the application being that he had been inveigled into signing a request to a solicitor to enter his appearance to the suit, which he had, as he alleged, signed in assurance of its character. He made no application for relief until after he had known of the decree for at least nine months, and after the evidence had all been taken under a creditor's bill, filed upon the decree against him and his father-in-law, to set aside conveyances made by him to the latter, and the cause which he defended had been set down for hearing.—*Held*, that he was barred by his laches.

2. Conveyances by a debtor declared fraudulent as against a creditor.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. J. W. Field, for complainant.

Mr. R. O. Babbitt, for defendants Whitenack and Wack-smuth.

THE CHANCELLOR.

The complainant, on the 14th of July, 1877, obtained a personal decree for deficiency against John H. Whitenack, in a suit for foreclosure brought by him against Augustus Klemm and Whitenack, and Benjamin F. Small, in this court, on a mortgage on a tract of land in the township of West Orange, in Essex county. The decree against Whitenack was based on an assumption by him to pay the mortgage, contained in a deed from Klemm to Whitenack for the property, made on or about the 20th of January, 1877. The amount of the mortgage was computed and allowed to him as so much of the consideration of that conveyance. After applying the proceeds of the sale of the mortgaged

Embury v. Klemm.

premises, under the execution for the sale thereof issued in that cause, to the payment of the money thereby directed to be paid to the complainant, there was a deficiency of about \$4,400, which is still unpaid. Execution therefor was issued against Whitenack and the other defendants, against whom personal decrees for deficiency were made in that suit, which was returned wholly unsatisfied. The complainant then filed his bill in this suit to subject to the payment of the decree for deficiency against Whitenack, a tract of land in the before-mentioned township, adjoining the mortgaged premises. For that tract Whitenack executed a deed of conveyance in fee to his father-in-law, Ludwig Wacksmuth, dated April 14th, 1877, purporting to convey it for the consideration of \$4,000, and Wacksmuth and his wife, by their deed dated May 2d, 1877, conveyed it to the wife of Whitenack (who is their daughter), for the consideration, as therein expressed, of \$4,000. This latter deed has never been recorded. Subsequently, the complainant filed another bill in this court to subject to the payment of that decree for deficiency against Whitenack, the money and a mortgage received by Wacksmuth as consideration of the conveyance by him of land in New York, which was owned by Whitenack on the 16th of April, 1877, and which was then conveyed by him to Wacksmuth. The two causes were, by consent of counsel, heard together on the evidence taken in this suit. At the same time a motion in behalf of Whitenack to set aside the decree for deficiency against him, and let him in to answer, on the ground of surprise and merits, was argued. Both suits and the motion will be disposed of in this opinion.

Whitenack alleges that he had no notice of the character of the foreclosure suit, and was not aware that any decree therein was sought against him. Although, in accordance with a written request to a solicitor of this court, made by him on the 5th of May, 1877, his appearance was entered, he alleges that he was inveigled into signing the request by the complainant's solicitor, and was deceived by him as to

Embury v. Klemm.

the character and object of the suit. He alleges that he was not aware, until after the sale of the mortgaged premises had been made, that the suit was a suit for foreclosure, but was informed by the complainant's solicitor that it was an action against Klemm to recover the amount of certain promissory notes made by him and held by the complainant. It appears, however, that the complainant's solicitor published notice of the suit, directed to him and his wife, with notice of the prayer for decree for deficiency against him, and sent a copy of it by mail to his address in New York, and Whitenack does not allege that he did not receive it. The reason why the solicitor published and mailed the notice after Whitenack had signed the request that his appearance might be entered, was, that he apprehended that Whitenack's wife would not be bound by the appearance entered for her by the solicitor to whom the request was directed, because she had not signed it, and he therefore published and sent notice to both Whitenack and his wife.

Again, in October, 1877, after the mortgaged premises had been sold under the decree of foreclosure, the complainant's solicitor called on him in New York and offered to convey the property to him if he would pay the amount of the decree. Although he was then apprised of the fact that there was a decree for deficiency against him in the suit, he made no complaint of or in reference to it, nor did he ever make any, as far as appears, until after the evidence in this cause had been taken and printed, and the cause was on the list for hearing. The cause was on the list of May term, 1878, and the notice of motion to set aside the decree for deficiency was not given until the 3d of July following. He would be barred by his laches alone. His delay in making his application for relief is inexcusable. But, apart from that, the weight of evidence is against him. The weight of the testimony shows that he voluntarily and understandingly signed the request that his appearance might be entered; that no deceit or artifice was used to obtain it, and that he

Embury v. Klemm.

not only knew of the fact that the decree for deficiency was about to be made against him, but said, when this fact was mentioned to him by the complainant's solicitor as a reason why he should take the property which the complainant had bought at the sheriff's sale under the execution, that he had "fixed his property so that no money could be collected of him."

Moreover, the application is entirely without merits. It is shown conclusively, by the evidence, that he assumed, with full knowledge of the character and extent of the obligation, the payment of the mortgage. Though he demurred at first, immediately after the contract was signed in pursuance of which the conveyance to him which contained the assumption was made, yet it is clearly proved that he was not only thoroughly apprised of the character and extent of the obligation before the deed was delivered to him, but an option was given to him by Klemm, the grantor, to extend the mortgage over the property in West Orange, in question in this suit, (which it did not cover), in lieu of the assumption, and he chose rather to assume the mortgage, and accepted the deed accordingly. The motion to set aside the decree will, therefore, be denied, with costs.

The merits of the two suits under consideration involve the question whether Whitenack was indebted to Wacksmuth when the conveyances by the former to the latter, of the property in West Orange and the property in New York, were made. If this question is decided in the negative, the conveyances must be held to be fraudulent as against the complainant. If they were voluntary, they are fraudulent as against the complainant's decree, for the obligation upon which it was obtained was then in existence. *Phelps v. Morrison*, 9 C. E. Gr. 195. But it is alleged by Whitenack and Wacksmuth that they were not voluntary. Both say that the former then owed the latter a large sum of money. Whitenack says it was over \$2,800 of principal, besides interest from 1865. Wacksmuth, however, says the principal was only \$2,800. There was, then, according to

Embury v. Klemm.

Wacksmuth's statement as to the amount of principal, about \$5,000, principal and interest, due from Whitenack to him. The consideration expressed in the deeds was \$5,000 for the New York property and \$4,000 for the other —\$9,000 in all.

The deeds for the West Orange property (the deed from Whitenack to Wacksmuth and the deed from the latter to the wife of the former), which are the only original ones which have been exhibited, are both apparently filled up in the handwriting of Whitenack, and seem to have been drawn at the same time. As before stated, the deed to Wacksmuth is dated April 14th, 1877, and the deed from him to Whitenack's wife is dated on the 2d of May following. The New York property was conveyed by Wacksmuth to John W. Tayntor, in February, 1878, for the consideration of \$2,200, for \$2,000 of which a mortgage for that sum on property in the city of Elizabeth was assigned, and the balance (\$200) was paid in cash. Whitenack obtained the purchaser for this property, and himself directed the making of the conveyance. Indeed, Wacksmuth appears to have been, both as to this and the other property, a mere depository of the title in trust for Whitenack.

The evidence in regard to the alleged indebtedness from Whitenack is by no means persuasive; but, on the other hand, it is of such a character as to induce the gravest suspicion, and, indeed, to challenge discredit. Wacksmuth and Whitenack do not agree as to its amount. Both say it was for money lent and interest thereon. The former says the money lent was only \$2,800. The latter says it was more. He says Wacksmuth lent him "\$2,800, at different times, and some money after that, at different times," and he produces a memorandum in which, he says, the loans were entered. It credits Wacksmuth with \$150, as having been lent by him to Whitenack in January, February and March, 1868, in addition to the \$2,800 lent, as alleged, in 1865; but Wacksmuth swears that the \$2,800 was all that he lent Whitenack. This written memorandum is all the

Embury *v.* Klemm.

written evidence of the transaction, and it is of so suspicious a character as to be of no value as evidence in favor of Wacksmuth. To the question, on cross-examination, whether he did not make all the entries in it at the same time, Whitenack answered that he "might have transferred them from some other account, possibly," and added that he had a book in which he used to keep an account—a long, narrow book; but whether he transferred these items from it or not, he said he could not say, but might have done so. Straightway afterwards, he said that he could not say whether he had the account of these loans in that book or not, and subsequently he said that his recollection was that that book had disappeared before he had anything to do with Wacksmuth. Afterwards he swore that the memorandum-book was the book in which the account was kept, and that the credits to Wacksmuth were set down at the time the loans were obtained. An examination of the books shows, beyond question, that the items constituting the \$2,800 were all written at the same time, although they cover a period of more than three months, from April 20th to August 1st. In his direct examination, he swore positively that the memorandum in question was the only record of the loans, and that the entries therein were made at the dates of the items. In 1868, he made application to be adjudicated a bankrupt. In his schedule, he said, on oath, that he had no individual creditors. Both he and Wacksmuth say that he gave Wacksmuth nothing to show for the money when (as they say) he borrowed it.

Wacksmuth says he does not know whether the first money (\$200) was borrowed before or after Whitenack married his daughter, which was April 16th, 1865. He says he worked for the money, and earned it. He is a tailor. In 1866, he sold out his shop in New York, for \$200, and came over to Jersey City to live. He bought a lot there, for \$200, and put a house upon it. Whitenack built it for him. It cost Wacksmuth about \$1,000, and he says he paid Whitenack the cash for it, and that the loan

Embury v. Klemm.

was not applied to the payment of the building, but still remained. He gave a mortgage of \$300 on the property, which he appears to have never been able to pay. He says that in December, 1876, and again in January following, he asked Whitenack for money to pay this mortgage, but the latter said he could not give him any. He says he asked him to pay the whole of the money which he owed him (\$2,800), and that Whitenack, professing to be unable to pay him in any other way, proposed to convey, and did convey, accordingly, the New York and West Orange property to him for his debt. No discharge or acquittance of any kind was given. As before stated, the consideration of the deeds was, in the aggregate, \$9,000, while the alleged debt and interest amounted only to about \$5,000. Immediately after the conveyance of the West Orange property to him, he conveyed it to his daughter (Whitenack's wife), as a gift, he says, not even requiring money enough to pay the mortgage of \$300 on his house, on which, it appears, he has been compelled to ask for an extension of time. The deed to Whitenack's wife expresses a consideration of \$4,000. It has never been recorded. A very short time after the foreclosure suit was begun (it was commenced in March, 1877), Klemm informed Whitenack of it, and after that, and about the middle of April, 1877, the complainant's solicitor spoke to him on the subject. It is, therefore, manifest that, when the conveyances to Wacksmuth were made, Whitenack knew that suit had been begun against him. When the complainant's solicitor spoke to him, in October, 1877, as to his liability to a decree for deficiency in that suit, he said he "had no property; that he had fixed his property so that he had none; that he owed his mother \$1,000, and he had fixed his property so as to cover that, and had shaped his affairs so that no money could be collected of him."

There is about the conveyances abundant evidence of fraud. They were made after the foreclosure suit was commenced. They conveyed all Whitenack's real property. The conveyances were made to his father-in-law. In less

Embury v. Klemm.

than three weeks afterwards, Whitenack having drawn, or caused to be drawn, without consultation with or direction from his father-in-law, a deed for the West Orange property, conveying it to Whitenack's wife, for the pretended consideration of \$4,000, produced it, and Wacksmuth and his wife at once executed it. That deed was, in fact, a secret conveyance. Though Wacksmuth states that the reason why he obtained the conveyances from Whitenack was, that he wanted his money, he conveyed away, without consideration, and, as he says, as a present, the West Orange property. Wacksmuth never saw the property, and says he knows nothing of its value. As to the New York property, after it was conveyed to Wacksmuth, Whitenack continued to exercise complete control over it, as far as appears. It was he who found a purchaser for it. He caused the deed for it to the purchaser to be drawn, and directed Wacksmuth to execute it, and he did so accordingly. Whitenack left both of the deeds to Wacksmuth at the recording offices, to be recorded. The evidence adduced to prove consideration of the conveyances to Wacksmuth, is of such a character as to excite distrust and induce disbelief. The amount of the consideration expressed in the deeds is not in accordance with the statements of Whitenack and Wacksmuth as to the consideration of these conveyances. For the alleged debt which, as they say, formed that consideration, there never was any evidence in the hands of the pretended creditor, and when, as they say, it was paid by the conveyances, there was no receipt or acquittance given for it. Wacksmuth was a man of but small means, so small that he has not been able for years to pay off a \$300 mortgage on the house in which he lives. He employed Whitenack to build that house, and paid him \$1,000 in cash, although, as they say, the latter then owed him \$2,800, and they give no reason whatever for this unusual course of business. Wacksmuth, though (as he says) he pressed Whitenack to pay him so that he might pay the \$300 mortgage, and the latter conveyed the two properties to him accordingly, gave away the West

Walker v. Montclair & Greenwood Lake Railway Co.

Orange property almost as soon as it was conveyed to him. Until the property in New York and the property in West Orange were conveyed to him by Whitenack, he had no property except the property (a house and lot) in which he lives. There is not only no satisfactory evidence of the existence of a debt from Whitenack to Wacksmuth, but Whitenack, in 1868, declared, on oath, that he owed no individual debts, and Wacksmuth does not appear to have asked for payment from 1865 to the end of 1876, eleven years.

The conveyance from Whitenack to Wacksmuth will be declared to have been fraudulent as against the complainant; but as to the New York property, the \$200 and the mortgage received by Wacksmuth for the price of that property will be subjected to the payment of the decree, the purchase by Tayntor being, so far as he was concerned, as far as appears, *bona fide*.

GEORGE WALKER and others, trustees,

v.

THE MONTCLAIR AND GREENWOOD LAKE RAILWAY COMPANY.

One of a number of bondholders who had entered into an agreement for the purchase of the mortgaged premises at the sale under the execution in the foreclosure proceedings, applied for an order setting aside the sale (the property had been bought by the combination at the sale) on the ground that the purchasing committee of the combination had, contrary to the agreement under which the combination was formed (that is, after the time limited in the agreement for coming in), let in other bondholders; also, that they had stifled competition at the sale by purchasing, after an adjournment of the sale and before the sale took place, for the account of a railroad company which came in subsequently and after the limited time, the bonds of a person who was a determined bidder when the property was first put up for sale.—*Held*, that the objection that other bondholders were

Walker v. Montclair & Greenwood Lake Railway Co.

let into participation in the benefits of the combination agreement after the time limited therein, could not, under the circumstances, find favor in equity, and that the alleged stifling of competition was the act of the agents of the petitioner, and it did not appear that it had affected his interest injuriously in any way.

On petition of Charles W. Hassler, for an order setting aside master's sale, &c., &c. Application for order to show cause.

Mr. J. D. Bedle, for the motion.

Mr. Cortlandt Parker, *contra*.

THE CHANCELLOR.

The petitioner prays that the sale of the railroad and franchises, &c. of the defendants, by the master, under the writ of *fiery facias* issued upon the decree for foreclosure and sale in this cause, may be set aside and a resale ordered; that the receiver may be directed to retain possession of the railroad, &c., until the further order of this court; that the master may be directed to file a report of the sale, with a statement of the bonds received by him on account of the purchase-money, and from whom they were received, and that this court will ascertain and determine what persons deposited their bonds and paid their assessments according to the terms of the agreement of bondholders, made after the issuing of the *fiery facias*, for the purchase of the railroad and its franchises, &c.

The agreement provided for the purchase of the road in behalf of such of the holders of the first and second mortgage bonds as should subscribe to it and deposit their bonds, and pay an assessment of five per cent. on the principal thereof, on or before September 10th, 1878. The object of the assessment was to raise a fund for the payment of liens (wages of employes, &c.) paramount to the mortgages, and to pay the percentage of the purchase-money to

Walker v. Montclair & Greenwood Lake Railway Co.

which bondholders not coming in under the agreement would be entitled, &c., &c.

The petitioner is one of those who subscribed to that agreement. The ground of his complaint is, not that the proceedings of the master in the conduct of the sale were not fair and lawful, but that, by reason of the action of the purchasing committee, appointed under the agreement, in admitting to participation in the benefits of the purchase, bondholders who did not come in on or before the time limited for the purpose in the agreement (the 10th of September, 1878), he has not derived from the arrangement the advantage which he reasonably expected to reap. He also alleges that the committee stifled competition at the sale by the purchasing, between the 28th of September (when the property was put up for sale), and the 5th of October (to which day the sale was adjourned) by one of their number, for the account of the New York, Lake Erie and Western Railroad Company, of the bonds of Arthur W. Benson, a bidder, who had expressed a determination to bid up the property to a very considerable amount, and who, on the 28th of September, bid for it \$156,000, or some such sum, and was willing to give much more, and protested against the adjournment of the sale. It appears that the bonds held by Mr. Benson were, after the adjournment, purchased from him, and the purchasers thereof came into the arrangement for purchase of the mortgaged premises under the agreement. The purchasing committee were, by the terms of the agreement, to buy the property unless, in their judgment, the sum bid by other parties should exceed its fair value, in which case they were authorized to allow such other parties to purchase.

It is not alleged that Mr. Benson or any one else intended to bid up to the amount of the fair value of the property. It, therefore, does not appear but that the purchasing committee would have been bound, in the discharge of their duty, to buy in the property. If compelled to buy it, it is obvious that the higher the price the greater would have

Walker v. Montclair & Greenwood Lake Railway Co.

been the amount of money to be paid by the combination to those who did not come in. Unless, therefore, Mr. Benson or some one else proposed to bid up the property to its value, it was manifestly to the interest of the petitioner and his associates in the combination that competition should be prevented. It was to their interest that the property should be bought at as low a price as practicable. By the purchase of the bonds of Mr. Benson, by those who were willing to come into the combination, not only was competition silenced, but an accession to the funds of the combination by means of the assessment of those bonds was obtained in place of the payment of a dividend thereon of the price at which the combination would buy the property.

It does not appear, therefore, to say the very least of it, that any injury was done to the combination by the arrangement.

The petition also alleges that the purchasing committee not only sold the bonds held by themselves to the New York, Lake Erie and Western Railroad Company, but bought others for that company, so that it obtained the majority of the whole issue of first mortgage bonds, and that the purchasing committee admitted that company, in respect of those bonds, to a participation in the benefits of the agreement, although it did not, nor did those from whom the bonds held by it were purchased, come into the arrangement on or before the 10th of September; and the petitioner's counsel urges that the admission of that company or its representatives, as the holders of the bonds owned by it, to the benefits of the combination, was in derogation of the rights of those who came in on or before the 10th of September, because the agreement expressly provided that no bondholder should have the right to share in the purchase to be made under the agreement, who should not sign his assent and make payment of his assessment before the 10th of September. It is enough to say, on that head, that the validity of the sale obviously cannot be affected by that con

Walker v. Montclair & Greenwood Lake Railway Co.

sideration, nor will that consideration avail to set aside the sale.

It appears by the petition, it may be remarked, that the petitioner was aware, on the 30th of October, more than a month before the filing of the petition, that it was designed to admit to participation bondholders who had come in after the 10th of September. He might then have taken steps with a view to vindicating his rights under the agreement. He did not do so. This proceeding cannot be made available for that purpose. It will not be out of place to remark that, while such agreements may be regarded as having the merit of protecting the bondholders, by preventing a sacrifice of the property, yet, in most cases, they operate to the advantage of rich bondholders, and to the exclusion, practically, of the poorer and helpless ones from the benefit of the mortgaged premises. Therefore, where they exist, the extension of their advantages to all the bondholders on equitable terms could not be looked upon by a court of equity with disfavor, but, on the contrary, would be regarded, at least, with complacency. And in a case where those advantages have been extended to bondholders who have come in after the time limited in the agreement, but who have otherwise complied with its terms, an application to exclude them from participation would lack the essential element of equity.

And, again, when those who have entered into such an agreement come to this court to complain that competition at the sale was prevented, if it appears that the act complained of was that of their own agent, acting in their interest, that fact cannot be left out of sight, nor can the court fail to remember that the effect of such agreements is not to excite or encourage competition, but just the reverse.

But, further, the petitioner has, by his unreasonable inaction, forfeited any claim which he might have had to relief in reference to the sale. The sale took place on the 5th of October. The master's deed for the property was delivered on the 9th of that month. The assessments have been paid

Budd v. Atkinson.

in under the agreement, and have, to a great extent, been paid out in satisfaction of paramount claims for the wages of employes, &c.

It appears from the petition that the petitioner was aware of the matters which are the grounds of this application, on the 30th of October. He permitted more than a month to elapse before making this application. In the meantime the new corporation has been created and the property has been conveyed to it. It was conveyed on the 5th of November. It is but reasonable to presume that rights and interests and equities have been acquired, and have arisen in the premises, since the 30th of October, which would be prejudiced, if not destroyed, by setting aside the sale.

The petition will be dismissed, with costs.

JOHN S. BUDD

v.

ALFRED ATKINSON and others.

A father bought a farm and caused it to be conveyed to his son by deed duly recorded. The son entered into possession of the property and lived upon it. After he went into possession, he contracted debts on the credit of his ownership of the farm. Subsequently, at his father's request, as they said, he conveyed the property to his father, without consideration and on the allegation that the latter had never intended to give the farm to him, and that the son was not aware that the conveyance had been made to him.—*Held*, that the deed to the father was fraudulent as against the creditor.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. M. R. Sooy, for complainant.

Mr. F. Voorhees, for defendants.

Budd v. Atkinson.

THE CHANCELLOR.

The question presented for adjudication is, whether a deed from Alfred Atkinson to his father, Lewis Atkinson, for a farm in Burlington county, is fraudulent as against the complainant as a judgment creditor of the former. When the complainant's debt was contracted, Alfred was in possession of the farm, and was, apparently, the owner of it. It had been previously conveyed to him by Samuel Goldy and his wife, and the deed from them to him for it, conveying it in fee-simple to his own use, was on record when the debt was contracted. After the debt was contracted, and before suit was brought upon it, Alfred conveyed the property in fee to his father. There was no pecuniary consideration for that conveyance, but Alfred and his father allege that it was made merely for the purpose of vesting the title in the latter. The property was bought by Lewis, from Goldy, and he paid what was paid (\$1,500) on account of the purchase-money (\$6,000), the balance being the amount of two mortgages which were upon the property when it was sold. He states that, when he bought the property, he intended to give it to Alfred, if it should appear that the latter would be likely to do well with it, and that he therefore caused the deed from Goldy to be made to Alfred, but that it was delivered to him, and not to Alfred, and that the latter never knew, until he (Lewis) asked him to convey the property to him, that the title was in him.

The deed from Alfred to his father must be held to be fraudulent as against the complainant. From the spring of 1870, down to the commencement of this suit, Alfred was in possession of the farm, dealing with it as his own. The complainant's debt was contracted between 1873 and July 1st, 1876. The deed from Alfred to his father was dated August 9th, 1876. It was not recorded, however, until the 8th of December following. The complainant testifies that, when his debt was contracted, he believed that Alfred was the owner of the property, and he says that the reason why

Budd v. Atkinson.

he gave him the credit was because he thought he was the owner of it; that after the debt had been contracted, and in October, 1876, he caused a search to be made of the records of Burlington county, and, from it, found that the title was in Alfred, of record, and that he therefore delayed commencing suit against him.

Absalom E. Cox testifies that he has heard Alfred say that he had a deed for the farm, and has heard him speak of the farm as being his. Charles H. Haines, who was the assessor of the township from 1873 until he was sworn as a witness in this suit, testifies that he assessed the farm to Alfred, because he thought he was the owner of it; that he never asked him, until the spring of 1877, as to whom he should assess the property, and then Alfred told him to assess it to him.

Alfred remained on the farm after the deed to his father was made, the same as before. The deed from Goldy was not made to Lewis, but to Alfred. It was duly delivered. The delivery to Lewis was a valid delivery, and the title to the property was thereby vested in Alfred, who thus became and was the legal owner. If Lewis, indeed, intended that Alfred should only hold the title in trust for him until such time as he should see fit to give him the property, he, by causing the deed to be made to Alfred, and causing it to be recorded, held out the latter to the public as the owner of the farm; and as to those with whom Alfred contracted debts while the title so remained in him, the conveyance to Lewis was constructively fraudulent. *Besson v. Eveland*, 11 C. E. Gr. 468.

In March, 1872, a settlement was made between Alfred and his father of their mutual dealings, and the former was then found to be indebted to the latter in a sum exceeding \$1,800, for money lent to Alfred by his father, and interest paid by the latter on the mortgages on the property, which interest and the taxes, they say, the former was to pay as rent for the premises. Alfred then gave to his father his promissory note for \$1,700, at which amount the indebted-

Budd v. Atkinson.

ness was fixed, and secured its payment by a mortgage upon his personal property. In 1873 he gave to his father another mortgage upon his personal property, further to secure the payment of that debt, and on the 15th of August, 1876, he confessed a judgment to his father for the same debt. No levy was made, under that judgment, on the farm. It had been conveyed by Alfred to his father before that time. The latter insists that, if the farm is to be held to have been, up to the time of that conveyance, the property of Alfred, as to his creditors whose debts were contracted while he held the title, his judgment, which is prior in date of recovery to that of the complainant, must be held to be a lien upon it prior to the complainant's judgment, or the amount due from Alfred to his father on the note must be regarded, in equity, as secured by the deed.

The answer of Lewis makes no claim that the conveyance to him was in satisfaction or on account of his judgment, but alleges that it was made merely to vest the title in him as the owner of the property. And, again, Lewis has two chattel mortgages and a levy upon Alfred's personal property for his debt, and it does not appear that he has not sufficient security thereby. There is reason to believe that the farm was an advancement by Lewis to Alfred. It does not appear that the money which the former paid for purchase-money on the conveyance of it to the latter was beyond the latter's share of his estate, and though he subsequently paid off one of the mortgages (for \$2,500) on the property, it appears that, as to \$2,000 of the amount, he raised it on a mortgage, which, as he says, he supposed was on the farm conveyed to Alfred, together with his own, but which, to his surprise, he found, subsequently, had been put upon his farm alone. Though in his testimony he states that he bought the farm in question for his own use, and expected to work it; that he did not then know that Alfred contemplated marriage, but first learned that fact in the spring, after the 25th of March, and did not know it when the deed was made to Alfred: he says, in his answer, that

Budd v. Atkinson.

Alfred resided with him when he bought the farm, and continued to do so until April following (the deed to Alfred is dated March 25th, 1870); that in the fall of the year 1869, knowing that Alfred was intending to marry during the winter or spring then next ensuing, and knowing, also, that the only business which Alfred was acquainted with was farming, and that he had no stock or implements with which to cultivate a farm, nor any means with which to buy a farm, or stock, or farming implements, and being desirous that Alfred might have an opportunity afforded him of obtaining a livelihood, he bought the farm in question. It will be seen that, so far from being ignorant, when he bought the farm, of the fact that Alfred contemplated marriage, he gives in his answer the fact that the latter did then contemplate marriage, as one of the considerations which moved him to buy it. Alfred, in his testimony, says that the way he understood the purchase was, that his father bought the farm for his uncle, Hollingshead, and the latter did not take it. The answer of Lewis and the testimony show clearly that it was bought for Alfred, though Lewis, in his testimony, says that he "bought the farm for himself, and expected to farm it," and Alfred says it was bought for his uncle, as he understood it. Alfred was married in the spring of 1870.

The proof in the cause seems far more consistent with the proposition that the farm was an advancement, and when Lewis found that Alfred was embarrassed in his pecuniary affairs he deemed it proper to obtain a conveyance of it to himself, to protect it against Alfred's creditors, than with the statement of Lewis, that he obtained the conveyance because he thought Alfred had had the farm long enough; for, as before stated, Alfred remained in possession after the conveyance just as he had been before. When the conveyance was made to Lewis, Alfred was embarrassed, and, without the farm, was insolvent. The execution issued against him on the complainant's judgment has been returned wholly unsatisfied for want of property whereon to

Budd v. Atkinson.

levy. It was issued in March, 1877. Alfred confessed the judgment to his father, August 15th, 1876. The deed to the latter was made six days before that time, but was not recorded for four months. Alfred said, in reference to the judgment confessed to his father, that it was confessed because "people were suing him around," and he and his father "thought they would put a stop to it." He says that his father left word with his (Alfred's) wife that he wanted "the deed back for the farm, so that he could sell it," but there is no evidence whatever of any intention to sell the property. The excuse given for not having recorded the deed from Alfred for four months after it was executed, is far from satisfactory. Lewis says he cannot tell why he did not record it earlier, and adds, by way of suggestion, that he supposes he did not happen to go to Mount Holly; but it is eminently worthy of remark, in this connection, that he caused the deed to Alfred to be recorded within three days after it was delivered; that he filed the first chattel mortgage in three days after it was executed, and the second on the same day on which it was given. Nor is it at all clear, from the testimony, that the statement of Lewis and Alfred that the latter did not know that the deed for the property had been made to him until the time when he was requested to convey the farm to his father, is true.

In addition to the testimony of Absalom E. Cox, before mentioned, there is that of the complainant, that Alfred admitted that his father could not sell the property without his consent, and there are cogent suggestions from the testimony of Alfred and his father leading to the conclusion that it is by no means probable that Alfred was not aware that the title to the farm was in him until called upon to convey.

The deed to Lewis will be declared fraudulent as against the complainant's judgment.

Bolton v. Stretch.

JOSEPH D. BOLTON

v.

ROBERT STRETCH, executor, &c., and others.

1. Where a testator, by his will, gave the residue of his estate to his widow *durante viduitate*, and directed that, after she should cease to be his widow, his executors should sell his estate, real and personal, remaining, and gave the proceeds of the sale to such of his children as should then be living, in equal shares,—*Held*, that the interest of the children in the land was subject to the power of sale, and that the power was not liable to be defeated by one or more (less than the whole number) of the beneficiaries thereunder, to the prejudice of the others or any of them, and that, after the sale, it was too late to exercise the power of election. Therefore, that the purchaser of the real estate at the executors' sale took title clear of a levy under an execution on a judgment against one of the children.

2. A notice given by the sheriff to the executor, that he held an execution on the judgment, and had made a levy thereunder, when, in fact, no execution had been delivered to him,—*Held*, not to be notice of the execution. It was a notification of the alleged existence of facts which really had no existence, and was, therefore, of no importance, and imposed no duty on the executors.

Bill for relief. On final hearing on pleadings.*Mr. W. C. Dayton* and *Mr. H. A. Drake*, for complainant.*Mr. W. E. Potter*, for the executor.*Mr. S. H. Grey*, for Joseph Stretch.

THE CHANCELLOR.

Thomas Stretch, deceased, by his will, which was admitted to probate in 1854, gave the residue of his estate to his wife *durante viduitate*, and directed that after she should cease to be his widow his executors should sell all his estate, real and personal, then remaining; and he gave the proceeds of

Bolton v. Stretch.

such sale to his ten children, or to such of them as should then be living, in equal shares. His wife, who survived him, died November 25th, 1875. Part of the residuary estate was a farm of about one hundred acres, in Gloucester county, which, after her death, and on the 28th of October, 1876, was sold by the surviving executor at public auction, to David B. Waddington, for \$4,075.50, to whom the executor conveyed it by deed dated November 11th, 1876. Waddington, on the 20th of February, 1877, sold and conveyed the property to Absalom M. Wallace. In the life-time of the widow, on the 31st of May, 1859, the complainant recovered judgment in the Gloucester circuit court against Joseph Stretch, one of the testator's sons, for \$304.47. No execution, however, was issued thereon until December 24th, 1875. Under a writ then issued upon it, a levy was made on the right, title and interest of Joseph Stretch in the farm, and in March, 1877, the sheriff sold and conveyed his right, title and interest, under the execution, to the complainant. On the 1st of December, 1875, the sheriff wrote to the surviving executor as follows :

"I have an execution against Joseph Stretch in favor of Joseph D. Bolton, and have levied on all the undivided right, title and interest of the real and personal property of Thomas Stretch, deceased, that may be due Joseph Stretch, and this is a notice to you that the execution must be satisfied before paying anything over to Joseph Stretch."

At the date of that letter no execution had been issued on the judgment, nor was any issued thereon until twenty-three days afterward. The sheriff gave to the executor no other notice until November 27th, 1876, sixteen days after the date of the conveyance of the farm by the executor to Waddington. He then wrote to the executor that the complainant had called to see him about the judgment, and had directed him to advertise Joseph Stretch's interest in his father's estate unless the judgment should be paid in a short time. The complainant himself gave no notice to the executor, although he was present at the sale, by the latter, of

Bolton v. Stretch.

the farm. The executor, on the 14th of November, 1876, paid over to Joseph Stretch (who demanded it of him) his share of the proceeds of the sale of the farm. Before doing so he consulted counsel as to his duty, in view of the notice given to him on the 1st of December, 1875, on the one hand, and the demand of Joseph Stretch on the other, and he was advised by them that, in the absence of any judicial mandate or direction in the premises, he was bound to comply with the demand of Joseph Stretch. It will have been seen that the sale by the sheriff was after the conveyance by the executor to Waddington. The complainant's counsel insist that the lien of the levy by the sheriff was not affected by the sale by the executors. But Joseph Stretch's interest in the farm was subject to the power of sale. *Bacot v. Wetmore*, 2 C. E. Gr. 250; *Wetmore v. Midmer*, 6 C. E. Gr. 240; *Nield v. Rudderow*, 12 C. E. Gr. 89; *S. C. on appeal*, 1 *Stew.* 274.

The power of sale given by the will to the executor was not liable to be defeated by one or more (less than the whole number) of the beneficiaries thereunder, to the prejudice of the others or any of them. All might, indeed, have elected to have the land instead of the proceeds, but the concurrence of all would have been necessary to prevent a sale, unless the power of election could have been allowed to a part without prejudice to the rest. But is too late, after the sale by the executor, to exercise the power of election. *Osgood v. Franklin*, 2 *Johns. Ch.* 1, 21. The purchaser at the executor's sale took title to the farm clear of the lien of the levy, and without any obligation to see to the application of the purchase-money. On paying it to the executor his duty in the premises was at an end.

The notice given by the sheriff to the executor, on the 1st of December, 1875, imposed no duty on the latter. The statement therein made, as to the issuing of an execution and a levy thereunder, was untrue. No execution had then been issued upon the judgment. The notice was not a warning of intention to issue an execution and to levy

Bolton v. Stretch.

thereunder, but an allegation of the then present existence of an execution and levy. Being a notification of the alleged existence of facts which had really no existence, it was of no importance whatever and devolved no duty on the executor.

Nor did any arise from the levy which was subsequently made. To impose any duty upon the executor in respect to it, it was necessary to bring it to his actual knowledge. It was incumbent on the complainant, if he desired to secure the application of the proceeds of Joseph Stretch's share of the property in the hands of the executor to the payment of his judgment, to take such steps by judicial proceedings as would effect that purpose, or at least to have given notice to the executor of his claim. In the absence of such proceedings, and of notice, he has, under the circumstances, no claim whatever upon the executor. The bill prays that the executor or Joseph Stretch may be decreed to pay to the complainant the amount of his judgment. There is no ground for equitable relief against either of them. None as against the executor, for the reasons already given, and there is none against Joseph Stretch. He has received from the executor, on his demand, his share under the will of the proceeds of the sale of the land by the executor. The levy was indeed a lien upon his interest in the land, but it was subordinate to the power. *Bacot v. Midmer, ubi supra.* Joseph Stretch, in receiving his share of the proceeds of the sale, incurred no liability for which the complainant is entitled to relief in equity against him, any more than he would have done had he sold and received the purchase-money for chattels (his property) levied upon under the execution and left in his possession, and sold or consumed by him after the levy.

The bill will be dismissed, with costs.

Coddington v. Idell.

AYERS CODDINGTON and others

v.

CHARLES W. IDELL.

1. One of three partners who declines to pay over a sum claimed by each of his other partners, cannot relieve himself from paying interest thereon pending the adjustment of the claim, if it appear that he has meanwhile used the money for his own purposes.

2. Where each party to a suit is partly successful, costs should not be awarded to either.

Bill for account, &c. On exceptions to master's report.

Mr. G. Collins, for Idell.

Mr. G. D. W. Vroom, for Wright.

Mr. R. V. Lindabury, for complainants.

THE CHANCELLOR.

Idell excepts to the master's report on the ground that he ought not be charged with interest on the balance of money in his hands due the complainants. He alleges that he was at all times ready to come to an account with his copartners, and to pay over the money which should be found due from him thereon, whenever they should settle a dispute between the Coddingtons on the one hand, and Wright on the other, in regard to their respective interests in the assets. Each of those parties notified him, it appears, not to pay the other any more money. If he has been holding the money which was due the Coddingtons from him, ready for payment whenever they and Wright should be ready to come to an account with him, he ought not to pay interest, but otherwise, if he has used it in his business or applied it to his own purposes. He does not say that he has not so used or applied it, and it appears, by a letter dated in February,

Coddington v. Idell.

1877, in evidence in the cause, that he has. Under the circumstances he should pay interest.

The complainants claim that he should be required to pay costs. It is urged that he refused to account on the ground that he was entitled to compensation for his services in the litigations which were carried on for collection of money due the firm—a claim which was disallowed in this suit. But although, on the one hand, he set up that claim in his answer, the complainants, on the other, denied his claim on them for contribution to his expenses in those suits, which was allowed. Under the circumstances no costs should be awarded to either side.

Wright excepts, because the master has not allowed him the sum (\$605) which he alleges he contributed to the capital of the concern. Though he swears he contributed the money, Brokaw and Augustus Coddington both swear that he did not. Though he swears that he paid the money in cash to Augustus Coddington, in the office of the latter, Coddington expressly and explicitly denies it. Now, is Wright corroborated? The written statement which he produces was made by himself, and though made in the presence of Augustus Coddington, and with the knowledge of the latter, Coddington swears that he objected to the item of "Cash received of Wright, \$605," saying that he did not believe Wright had so much capital in the concern. He says that Wright did not get the item from him, but put it down of his own accord. He also says that Wright never before that time claimed to him that he had that sum in the business. The written statement above mentioned appears to have been made, according to Wright's testimony, two or three years after the substitutes were furnished. It appears that the amount of undivided profits in the concern was \$627, and that sum, with the money which was furnished by the Coddingtons, and \$8,000 of the proceeds of bonds belonging to the firm and received for the substitutes, made up the amount needed to furnish the men. Augustus Coddington and Brokaw (the latter has no interest in the suit) both

Daw v. Vreeland.

swear that the Coddingtons furnished all the money which was needed for the purchase of the substitutes above the \$8,000, except the accumulated profits, which amounted, as Brokaw says, to about \$600, and as Augustus Coddington says, to \$627. They both swear, also, unequivocally, that except his share of the accumulated profits, Wright contributed nothing.

The exceptions will be overruled, but without costs.

THOMAS DAW

v.

ADRIAN VREELAND, trustee and executor, and others.

Although, by the statute concerning evidence (*Rev. p. 378*), a party cannot, in case the adverse party sues or is sued in a representative capacity, render his own testimony competent by calling such adverse party, yet the statute does not preclude him from calling such adverse party as his own witness.

Mr. S. Tuttle, for complainant.

Mr. E. Stevenson, for defendants.

THE CHANCELLOR.

The right of the complainant to call and examine the defendant, Adrian Vreeland, who is sued in a representative capacity, as a witness for him, is denied by the defendants. The act "concerning evidence" (*Rev. p. 378*) provides that, in all civil actions, in any court of record in this state, the parties thereto shall be admitted to be sworn and give evidence therein when called as witnesses by the adverse party in such action, but that no party shall be sworn in any case where the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the

Dayton v. Moore.

parties in the cause sue or are sued in a representative capacity, except as thereafter provided, viz., that a party to a suit in a representative capacity may be admitted as a witness therein, and, if called as a witness in his own behalf and admitted, the opposite party may, in like manner, be admitted as a witness.

Clearly, the act will not admit of the construction that a party sued in a representative capacity cannot be required to give testimony as a witness for the opposite party when called by that party. It was not intended to deprive a party of the testimony of his adversary as a witness for him in the cause where the latter is sued in a representative capacity. His so calling him, however, will not render his own testimony competent in the cause, and that is what was decided in *Hartman v. Alden*, 5 Vr. 518, cited on the argument, and all that was decided on the point in that case.

The complainant is entitled to the testimony of Mr. Vree-land as a witness for him.

JAMES B. DAYTON

v.

ACHSAH MOORE and others.

The receipt by a mortgagee's attorney, to whom the mortgage was made (in fact for the mortgagee, but not so expressed in the instrument), of a sum of money from the mortgagor's agent, under an agreement between them subsequent to the loan, as *bona fide* compensation for examining the title to the premises mortgaged, which compensation was paid out of the loan, does not make the loan usurious.

Bill to foreclose. On final hearing on pleadings and proofs.

Dayton v. Moore.

Mr. D. J. Pancoast, for complainant.

Mr. James N. Stratton, for defendants.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage dated March 14th, 1877, for \$3,500 (with interest), payable one year from its date, given by Aaron B. Moore, now deceased, to David J. Pancoast, on land in Burlington county. The answer alleges that the mortgage was made and taken on an agreement between the parties to it that the mortgagor should give, and the mortgagee receive, \$175 for premium for making the loan, and it states that that money was retained by the mortgagee accordingly. The alleged usury is not well pleaded, and, if it were, it is not proved. It appears that, although the mortgagee negotiated the loan, he did so merely as the agent of Samuel T. Miller, who was his client, and to whom he subsequently delivered a declaration of trust in writing, signed by him, to the effect that he held the mortgage merely in trust for Mr. Miller. It is not proved that he made the agreement stated in his answer, nor any such agreement; nor that he received \$175 or any other sum for premium. He did receive from the person whom the mortgagor had employed to obtain the loan, \$87.50, as his compensation agreed upon between them after the loan had been negotiated, and independently of the negotiations, for his services as a counsellor in examining the title to the premises to be mortgaged. The title was troublesome, and the mortgagee declined to examine and pass upon it without compensation. What he received was paid to him by the mortgagor's agent out of the latter's commissions received under the agreement between him and the mortgagor for obtaining the loan. The mortgagee paid over to the agent the entire \$3,500, and the latter paid it all over to another agent of the mortgagor, who paid him his commissions, out of which he paid the \$87.50 to the

Boyd v. Mundorf.

mortgagee on his own account and pursuant to his individual agreement with him.

The complainant is entitled to a decree in accordance with these views.

ADONIJAH S. BOYD

v.

CHRISTOPHER MUNDORF and wife and others.

A deed and a mortgage to the grantor to secure part of the purchase-money of the conveyance, were executed simultaneously on February 28th, and acknowledged and recorded on March 3d, at noon. Another mortgage on the same premises, to another person than the grantor, also stating that it was given to secure part of the purchase-money, was executed March 1st, and was acknowledged and registered March 3d, at a quarter before twelve o'clock, noon.—*Held*, that the first mortgage was entitled to priority, the registering of the second mortgage not being notice to the first mortgagee, the vendor, since at that time the vendee's deed had not been recorded.

Bill to foreclose. On final hearing on pleadings.

Mr. A. S. Boyd, in pro. pers.

Mr. G. Ackerson, Jr., for Henrietta R. Voorhis, administratrix.

THE CHANCELLOR.

Garret Benson, by his deed, dated February 28th, 1866, conveyed the mortgaged premises to Christopher Mundorf, in fee. The deed was acknowledged on the 3d of March following, and was recorded on that day, at noon. To secure \$2,000 of the purchase-money, Mundorf gave to Benson a mortgage (now held by Henrietta R. Voorhis,

Stucky v. Stucky.

administratrix, by assignment) on the property for that sum, with interest. The mortgage was of the same date as the deed, and was acknowledged on the same day on which the deed was acknowledged, and was recorded at the same time as the deed. Mundorf gave to Lawrence J. Ackerson a mortgage on the property for \$2,000 and interest, dated March 1st, 1869, acknowledged on the 3d day of that month, and recorded on the same day, at a quarter before twelve o'clock in the forenoon. It will be seen that the latter mortgage was recorded a quarter of an hour prior to that of Benson. The mortgage to Ackerson declares that it was given to secure the payment of part of the purchase-money of the conveyance from Benson to Mundorf.

The question in the cause is, whether the mortgage to Ackerson is, by reason of priority in recording, entitled to preference in payment over that to Benson. When the former was recorded, the deed to Mundorf was not on record. The record of that mortgage, therefore, was not notice to Benson. *Losey v. Simpson*, 3 Stock. 246. Where, as in this case, the vendor of real estate records his mortgage at the same instant that the deed from him is recorded, he surely can have no occasion to examine the records for encumbrances created by his vendee on the property, prior to the recording of his conveyance. See *Dusenbury v. Hulbert*, 59 N. Y. 541; *Clark v. Bunn*, 3 Allen 509.

The mortgage to Benson is entitled to priority.

HENRY STUCKY

v.

A. CATHARINE STUCKY, executrix, &c.

A. conveyed land to B. The latter subsequently sold it to C. A., by his bill, alleged and sought to establish an express trust in his favor in the consideration money of the deed from B. to C. The proof

Stucky v. Stucky.

failed.—*Held*, on the ground of variance, that he could not, under the bill, recover the money by proof that the conveyance from him to B. was merely voluntary. If the conveyance was merely voluntary, no resulting trust would arise therefrom.

Bill for relief. On final hearing on pleadings and proofs.

Mr. W. H. Hagaman and *Mr. C. Borchertling*, for complainant.

Mr. J. R. Emery, for defendant.

THE CHANCELLOR.

The bill is filed to compel the performance of an agreement which the complainant alleges that Jacob Stucky, his brother, now deceased (he died after the bill was filed), made with him, in 1871, to hold in trust for him certain money, \$3,400, and a mortgage for \$10,000, and interest respectively, paid and given by John O'Rourke to Jacob for the consideration of the conveyance by the latter to the former of a tract of land of thirteen and one-half acres in Essex county. The bill states that the complainant was, on or about the 16th of August, 1870, seized of the land; that it was purchased by him from Josiah F. Dodd, in 1853, and was conveyed to him by the latter by deed dated January 10th, in that year; that he then entered into possession of it, and that from that time up to the time of the date (August 16th, 1870) of a deed for it given by him to Jacob, he remained in possession of it and improved it, so that, by reason of his improvements and the rise in value of real estate, it had, when he conveyed it to Jacob, become worth \$13,400; that Jacob had been very desirous of buying the property from him, and had frequently applied to him to sell it to him, but that he had refused to sell it to him separately, but had expressed his willingness to sell it to him with the adjoining tract of seventeen acres belonging to the com-

Stucky v. Stucky.

plainant, at the price of \$35,000 for both, but Jacob refused to pay that price; that the complainant was then sixty years old, by birth a German, and by occupation a farmer; that having mingled but little with the world, and being ignorant of the requisites of legal business, and the formalities attending it, and having but little knowledge of the English language, and being unable to speak or read it understandingly, and being in the habit of consulting his brother Jacob who, on the other hand, was a man of business in Newark, he, in August, 1870, in view of the fact that his wife was confined to her bed with severe illness, and his own health had become seriously impaired, applied to Jacob, and requested him to attend to the drawing of the complainant's last will, informing him of his wishes as to the disposition of his property; that Jacob thereupon promised to attend to the business for him, to have the will drawn, and to bring it to him to be executed; that a few days thereafter Frederick Stucky, a son of Jacob's, and Herman Ise, then one of the judges of the court of common pleas of Essex county, called at his house on the property, and presented a paper to him for his signature, and requested him to sign it, but neither explained it nor informed him of its contents, and he, believing it to be the will, and assuming that it had been drawn in accordance with his directions, signed it, as did also his wife, who was then requested to do so.

The bill adds that his wife was then confined to her bed, and was at the point of death, and he was in a weak and enfeebled condition, both of body and mind, and unable to transact or understand any matter of business. It further states that he, on or about the 30th of June, 1871, contracted with John O'Rourke to sell him the tract of thirteen and a half acres, and that they went together to Jacob's store in Newark, and the complainant then and there informed Jacob that he had sold the property to O'Rourke, and that then, to his great surprise and amazement, Jacob produced a deed for the property from the complainant and his wife to him, duly executed and acknowledged, convey-

Stucky v. Stucky.

ing the premises to Jacob in fee-simple, and thereupon Jacob claimed to be the owner of the property under the deed; that the complainant then declared that the deed had been obtained by fraud, and denounced Jacob for having taken advantage of his confidence; and the bill states that that was the first knowledge or intimation the complainant had had of the existence of the deed, and that he then requested Jacob to give it up to be cancelled, but Jacob refused to do so.

The bill further states that the complainant being desirous of carrying out his agreement with O'Rourke, to whom he had sold the whole of the property to which he claimed title, both the tract of seventeen acres and that of thirteen and a half, and Jacob proposing that he should be permitted to convey the thirteen and a half acres to O'Rourke, and promising that he would hold the money and securities which he should receive for the consideration in trust for the complainant, the latter was constrained to consent, and did consent accordingly; that Jacob conveyed the property to O'Rourke, by deed dated June 30th, 1871, and received from him \$3,400 in cash, and a bond and mortgage on the premises to secure the balance (\$10,000) of the purchase-money, with interest, and that Jacob refused to pay over the money, or deliver the bond and mortgage to the complainant. The bill prays that Jacob may be declared to be the trustee of the complainant with respect to the money and securities received by him for the consideration, and may be directed to pay over the money and deliver the securities to the complainant; or, if the latter be impracticable, then that he be required to pay the amount of the principal and interest thereof instead.

The answer was filed in the life-time of Jacob Stucky. It states that the property was bought by him in 1853, for the benefit of his brother, the complainant, who had then but lately emigrated to this country from France; that, though the deed was made to the latter, it was under the express agreement that he would, on request, convey the property

Stucky v. Stucky.

to Jacob; that Jacob paid all the purchase-money (\$435.35), and it claims a resulting trust accordingly. It further states that, though the property had risen in value, the rise was due, not to any improvements put thereon by Henry, but to the speculation in lands in that vicinity. It denies that Jacob ever offered to buy the property from Henry, and denies all the facts on which the equity of the bill is based. It expressly and explicitly denies the allegations of the bill in reference to the circumstances under which the deed from Henry and his wife to Jacob was made, and states that the deed was executed in pursuance of an agreement between Henry and Jacob that the property should be conveyed to the latter, and it denies that the promise alleged in the bill (that Jacob would hold the money and securities received from O'Rourke for purchase-money in trust for Henry) was ever made.

The proof is, that Henry came to this country from France in 1853, and, as far as appears, he had but about \$80 at that time. The tract of thirteen and a half acres was bought by Jacob, as Josiah F. Dodd, the vendor, testifies, for Henry, and the deed was made to the latter by Jacob's direction, but the purchase-money was paid by Jacob. It appears, too, that when this tract was bought, Henry had already bought the adjoining tract of seventeen acres before mentioned. How much he agreed to pay for it, or with what means he paid for it, is not in the evidence. That he occupied the tract of thirteen and a half acres up to the time of the sale to O'Rourke, is not denied. The improvements which he put upon it, however, appear to have been of no great cost. They consisted in fencing, draining, &c. That the complainant did not claim to be the owner of it, appears from the testimony of O'Rourke, who says that he made the bargain for the purchase of the property with Henry, and that he and Henry then went to Newark to see Jacob, at the suggestion of Henry, who said that he could not sell that property until he should see his brother; and the witness adds, that he thinks he said that the property belonged

Stucky v. Stucky.

to his brother. It appears clearly and incontestably that Jacob was at that time, and had been for about a year, the holder of the legal title to the property, under a deed in fee executed by Henry and his wife to him, by which, for the consideration of \$25, as therein expressed, they conveyed the property to him. That deed was dated August 16th, 1870. It was acknowledged before Judge Ise (who drew it by direction of Henry and Jacob), on the 20th of that month, and it was recorded on the 19th of November following.

Though Henry, in his bill, states that he was greatly surprised and amazed when he found that Jacob had a deed from him for the property, and alleges that the first knowledge or information which he had of the existence of the deed was when it was shown to him on the occasion when he and O'Rourke went to see Jacob, which was in the summer of 1871, and declares that he supposed, up to that time, that the instrument which he and his wife executed at their house, in the presence of Judge Ise, was his will, it is not only clearly proved that he gave directions for the drawing of the deed, but that he was fully made acquainted with the contents at the time when he executed it. The statements of the bill as to the condition of his own and his wife's health are shown by the evidence to be untrue. By the testimony of Judge Ise, it also appears that there is no reason whatever for believing that the complainant could have supposed that the instrument which he executed at his house was his will, for Judge Ise testifies that the complainant himself gave him instructions for the will, and that it was signed, not at the complainant's house, which was in the township of Orange, but at the judge's office in Newark, and that one Caspar Friederich, of the latter place, witnessed the signing, with the judge. In this connection it may be remarked that the complainant's statement in the bill as to his want of knowledge of business, is not only not sustained, but is shown to be untrue by the testimony and the facts in the cause. Notably by the circumstances that he

Stucky v. Stucky.

alleges and it appears that he conducted the negotiation with O'Rourke for the sale of the entire property occupied by him, selling and conveying the tract of seventeen acres for the price of \$25,500, and negotiating the sale of the other at \$13,400. Moreover, he conducted the negotiations with O'Rourke in the English language, notwithstanding his allegation that he cannot speak that language intelligibly. The complainant presents, in support of his allegations, the testimony of Augustus F. Spaeth, who swears to conversations between himself and Jacob Stucky in regard to the deed for the tract of thirteen and a half acres. This witness was the son-in-law of Jacob Stucky, and appears to have interested himself in the business of the latter up to the time of the latter's death. He seems to have taken an active interest in the defence of this suit up to that time. He speaks in his testimony of his activity in getting in the answer, which was sworn to only a day or two before Jacob Stucky's death. He appears to have been anxious that it should be put in by Jacob Stucky, and to have been apprehensive lest by delay the opportunity should be lost.

After the death of Jacob Stucky, and on the 30th of December, 1876, he presented a bill against his estate of between \$1,500 and \$1,600, of which he says \$1,000 were for his services and advice in Jacob Stucky's business (he is not a lawyer), including the defence in this suit. On the 18th of November, his examination as a witness for the complainant began, and it was ended on the 19th of January following, so that the bill just referred to was presented during the time covered by his examination. He admits that he gave to the complainant's solicitor information in reference to the subject of the suit. On that head he testifies as follows: "Q. Are you assisting, or have you in any way assisted him (the complainant) in carrying on this suit? and, if so, how? A. I have given his attorney part of the information he wanted. Q. Well, what else? A. That is all, as I consider it; I am assisting in no other way.

Stucky v. Stucky.

Q. Did you give this information to his attorney for the purpose of assisting him in his suit? A. That is the only way I took it; I think that was what I meant. Q. Then you meant to destroy the effect of Jacob Stucky's answer? A. Yes, in reference to Henry Stucky's putting money in my hand; I had known him a long time; my wife was a niece of his; he had entire confidence in me; I think the amount of that money was a couple of hundred dollars; he insisted that it should simply be left with me, and I would not have it in that way." No explanation of this \$200 transaction is given. It may be added that the testimony of this witness in regard to the circumstances of the swearing to the answer, is flatly contradicted by the solicitor who had that matter in charge, and the master by whom the affidavit was taken.

But, further, his testimony is intrinsically unreliable. He swears that Jacob Stucky, a few days after the deed from the complainant to him was made, told him that he had received a deed from the complainant for certain woodland (the tract of thirteen and a half acres); that he asked him how he got it, and Jacob said that Judge Ise and Frederick (meaning his son) had gone to the complainant's and got it without trouble, &c. He also says: "He (Jacob Stucky) also spoke of a mortgage which had then been made, and asked me how he could control a mortgage which had been made to Henry (the complainant) for \$20,000." But, in fact, the \$20,000 mortgage had not then been made, and was not made until nearly a year after that time. The deed to Jacob was acknowledged, as before stated, on the 20th of August, 1870. The deed to O'Rourke, who gave the \$20,000 mortgage, was not made until June 30th, 1871. The witness, therefore, must be mistaken when he says that Jacob Stucky, a few days after the deed from the complainant to him was made, spoke to him about the \$20,000 mortgage.

There are other considerations, also, which are decisive of this suit. The bill is filed merely to establish a trust in

Lembeck v. Mayor, &c. of Jersey City.

the purchase-money of the tract of thirteen and a half acres, not to set aside the deed. There is no proof whatever of the alleged trust, and the answer explicitly denies it. If the deed to Jacob be regarded as merely voluntary, in view of its nominal consideration, no trust results therefrom. *Hill on Trustees* 106, 107; *Perry on Trusts* § 362; *Osborn v. Osborn*, 2 *Stew.* 385. But the bill does not even allege that the deed was voluntary. It alleges that it was fraudulent. It is enough to say that the complainant must abide by the case made by the bill. He stands or falls with it. *Marshman v. Conklin*, 6 *C. E. Gr.* 546; *Midmer v. Midmer*, 11 *C. E. Gr.* 299; *Hoyt v. Hoyt*, 12 *C. E. Gr.* 399, *S. C. on appeal*, 1 *Stew.* 485; 1 *Dan. Ch. Prac.* 328; *Montesquieu v. Savidge*, 18 *Ves.* 302.

The bill will be dismissed, with costs.

HENRY LEMBECK

v.

THE MAYOR AND ALDERMEN OF JERSEY CITY.

1. Under the act to quiet titles, etc. (*Rev.* p. 1189), a bill may be filed for relief against the alleged lien of municipal assessments for improvements.

2. The reports of commissioners of re-assessments made under the act of 1873 (*P. L.* 1873, p. 442), were relied on in this case. While vitally defective in other respects, they did not even show that the commissioners determined the amount of the assessments on each lot.—*Held*, that they constituted no lien.

3. The legislature has no power to fasten upon any lot an unconstitutional assessment, by a statutory limitation as to the time or mode in which the owner must object thereto.

Bill to quiet title. On final hearing on pleadings and proofs.

Lembeck v. Mayor, &c. of Jersey City.

Messrs. Collins & Corbin, for complainant.

Mr. Leon Abbett and *Mr. H. Traphagen*, for defendants.

THE CHANCELLOR.

The bill is filed against the corporation of Jersey City, under the act "to compel the determination of claims to real estate in certain cases, and to quiet title to the same" (*Rev. p. 1189*). Under the act, such a bill may be maintained to quiet title as against alleged encumbrances. *Holmes v. Chester*, 11 C. E. Gr. 79; *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568.

The city, in its answer, sets up a claim upon the premises of the complainant described in the bill. It is the lien or encumbrance of certain alleged assessments for municipal improvements therein mentioned, which, it alleges, "were confirmed" by commissioners appointed by the justices of the supreme court, in accordance with the act entitled "An act to adjust unpaid assessments in Jersey City," approved March 26th, 1873 (*P. L. 1873, p. 442*). It is not alleged in the answer, nor was it claimed on the hearing, that the complainant is barred or estopped in any way from denying the legality of the assessments. The original assessments are not set up in the answer, and they have not been proved or produced. Only the reports made by the commissioners, under the act of 1873, were set up and proved, and they alone were relied on by the defendants. The defendants rely entirely on the action of the commissioners in reference to the original assessments. It appears, by the reports of the commissioners, that, as to two of those assessments, they merely confirmed them, without adjudging or determining that the amounts assessed on the property owners for benefits were not beyond the amount of benefit received, or even that the property was benefited at all. They merely declared what the true cost was, and confirmed the original assessment, whatever it may have been.

Lembeck v. Mayor, &c. of Jersey City.

The act of 1873 provides that the commissioners, "after examination, shall determine and adjudge what would have been a reasonable and fair cost of the improvement, what lands are benefited by the improvement, the proportion of benefit received by each lot of land, and assess on each lot such proportion of what would have been a reasonable cost of the improvement, the expense of the improvement as the lot or parcel of land shall be benefited by the same, the remainder of the costs, charges and expenses of the improvement shall be borne and paid by the city at large," &c. A mere confirmation of the original assessment confirms it with all its infirmities, if any it has. If the original assessment did not confine the assessment within the limit of the amount of benefit actually conferred, the mere confirmation of it left it still subject to the objection. It was expressly the duty of the commissioners, under the act, to confine the assessments within that limit. They were to assess on each lot such proportion of the reasonable costs as should be commensurate with the benefit derived from the improvement (they could not lawfully assess more thereon), and it is expressly declared that the remainder of the costs shall be borne and paid by the city at large. In the two instances under consideration, they did not determine whether any part of the cost ought to be borne by the city at large, nor whether the whole cost ought to be borne by the property, nor whether the property was benefited to the full extent of the cost, nor, as before remarked, that it was benefited at all, nor that the complainant's land should pay any part of the cost. What the original assessments referred to in those reports were, is not shown, and it does not appear whether they were constitutional or not, nor whether they were made under a law which was constitutional or not.

In the other assessments their adjudication was defective, because, though it determined what the reasonable cost of the work was, and the part of it which ought to be borne by the city at large, it does not appear from it that the property was

Prall v. Hamil.

not assessed beyond the benefit received, nor did they assess any part of the cost on the complainant's land. The assessments in those cases were necessarily new ones, for the amounts to be assessed on the property were less than those which were assessed upon them in the original assessments.

It appears, then, that those assessments were made by the commissioners of 1873, on a principle which has been repeatedly and unequivocally condemned by the adjudication of the highest tribunal of the state—the assessment of the cost on the property without regard to the amount of actual benefit. No assessment upon the complainant's land is made by any of the reports. It may be added (although, as before stated, no question was raised on that subject on the hearing), that the legislature cannot fix an unconstitutional assessment upon the property owner merely by fixing a limitation to his right to object to it, or by requiring him to object within a certain time, or in a certain way, under penalty of being regarded as having waived his objection.

The complainant is entitled to a decree that the defendants have no claim against the land described in the bill, for they have shown none whatever.

WILLIAM PRALL and others

v.

ROBERT HAMIL and others.

The residue of an estate was given to a widow for life, and after her death to her children. No provision was made for their support, meanwhile, except that advances might be made to them by the widow. She was sole executrix, and pledged certain stocks of the estate as collateral security for her own debts. Some of the children filed a bill against her creditors to obtain the stock. The stock produced no income, and had depreciated very much in market value. The widow had greatly wasted the estate.—*Held*, that the court would

Prall v. Hamil.

not order a sale for the purpose of investing the proceeds and appropriating the income for the benefit of the creditors during the widow's life-time; and that, under the circumstances, in view of the great waste of the estate that she had committed, she had no interest for the creditors to take.

Bill for relief. On exception to master's report.

Mr. T. D. Hoxsey, for the exceptants.

THE CHANCELLOR.

By the order of reference the master was directed to ascertain and report what interest, if any, Edwin Prall and W. Mortimer Prall, children of Edwin T. Prall, deceased, have in the five hundred and fifty shares of the capital stock of the Arkwright Manufacturing Company, mentioned in the pleadings in the cause, and what interest, if any, Rachel M. Prall, widow of Edwin T. Prall, has therein, which can, consistently with the rights of the other children of Edwin T. Prall, under his will, be applied to the payment of the debt of the defendants, Hamil and Booth, for which Mrs. Prall, as executrix of her husband, pledged that stock to them. The master reports that Edwin and W. Mortimer Prall have no interest, but that the widow has a life-estate in the stock which can be taken consistently with the interests of the children other than Edwin and W. Mortimer, under the will. By the will the testator gave the residue of his estate to his wife during her widowhood, and directed that, on her death, it be divided into equal shares among the surviving children and the children (as a class) of any deceased child. He makes no provision for the support of his children, but provides for the making of advances to them by his widow. The estate was valued in the inventory and appraisement at \$223,216.80. The testator died July 5th, 1869. His widow was sole executrix. Of the estate there is now left only a small part, consisting of the stock in question and an investment of \$40,000, and the household furniture in use by the

Perkins v. Partridge.

family. Part of the rest was advanced to two of the children, and the balance appears to have been, to a very great extent, wasted. The stock in question appears to be productive of no income. There is no evidence on the subject annexed to the master's report, except the testimony of the widow that she does not suppose that it is worth more than twenty-five or thirty cents on the dollar.

The defendants, Hamil and Booth, in their answer, say, that when the answer was filed (January, 1876), there had not been, for a long time past, and there was not then, any market value or price for the stock, and that it could not then be sold for fifty per cent. of its par value, and that no dividend had ever been paid upon it. Such being the character of the stock, the widow has no interest therein which can be taken consistently with the interest of the children, other than Edwin and W. Mortimer, in the estate; for, under the will, she is entitled only to the use of the property, and it is wholly unproductive. It may, indeed, be sold, and the proceeds invested, and so income may be obtained from it, but the widow, as life-tenant trustee, is liable to account to those of her children who are entitled to the fund after her death, for the waste which she has committed. *Shibla v. Ely*, 2 Hal. Ch. 181; *Horry v. Glover*, 2 Hill Ch. 515; *Rowe v. White*, 1 C. E. Gr. 411. It does not appear that, on an account, she would be entitled to anything.

The exception is sustained.

L. MURRAY PERKINS

v.

CHARLES F. PARTRIDGE and others.

In order to file a bill of review upon the discovery of new matter, the rule is that the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have

Perkins v. Partridge.

known.—*Held*, that the evidence set up to support the petition in this case did not fulfill either requirement of the rule.

Bill for relief. On petition of defendant, Charles F. Partridge, for leave to file a bill of review.

Mr. S. Howell Jones, for petitioner.

Mr. B. A. Vail, for complainants.

THE CHANCELLOR.

The defendant, Charles F. Partridge, applies, by petition, for leave to file a bill of review upon newly-discovered evidence. The grounds stated in the petition are that the whereabouts of a Mr. Berry, a lawyer of New York, who, it is alleged, was a material witness for the petitioner, has, since the decree was made, been discovered by the petitioner, but could not previously be ascertained by him, though he diligently sought to learn it; that Mr. Berry will testify that he heard the conversation between Charles Partridge and Mr. Reed, and that the statements of the former to the latter were not, as Reed testifies, that the mortgage in question in the suit was a perfectly good, first-class mortgage; that the parties bound for its payment were good; that the interest had been paid promptly, and that he had sold the land for \$25 an acre, and would not sell any more of the tract for less than \$30 an acre; but that his statements were qualified, and were, that Partridge considered the mortgage to be good, but that Reed and the complainant must not take his opinion on the subject, as people's opinions might differ, but they must make inquiry for themselves; that Bouton & Phillipps had assumed the payment of the bond and mortgage of \$7,000, and were a firm represented to be in good standing in the flour business in Albany, and that they had paid the interest when it became due.

Perkins v. Partridge.

Further, that the petitioner can show by Berry that the sale and conveyance by Charles Partridge to Bouton & Philipps was *bona fide* and for \$51,000, and that the conveyance to Thomas H. Philipps was merely voluntary, and for the purpose of vesting the title in him that he might give the mortgage on the premises and convey the property subject to it to Bouton & Philipps, who were to assume it, but, for reasons connected with their commercial credit, did not want to become bound in the mortgage. Further, that he can now produce Bouton, of the firm of Bouton & Philipps, whose whereabouts he could not ascertain (though he strove to do so) till after the decree, and can prove by him that the interest was paid by Bouton & Philipps on the mortgage, in September and April, 1875. He further states that he can now produce the deed from Thomas H. Philipps to Bouton & Philipps. He also states that, because of his inability to produce the deed, and so fully prove the assumption, he did not produce evidence as to the commercial standing of that firm, which he otherwise would have done.

When the application is made to file a bill of review upon the discovery of new matter, the rule is, that the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known; for, if there be any laches or negligence in this respect, that destroys the title to the relief. *Story's Eq. Pl.* § 414. The proof as to inquiry for Mr. Berry's whereabouts is by no means such as to show diligence. But, apart from that objection, Charles Partridge, as to whose statements Reed testified, though twice examined as a witness for the defendants in the cause, did not deny that he had made those statements just as Reed swore he did. Indeed, he was not examined on that subject at all. His testimony in reference to them would have been better than that of Berry, who took no part in the conversation, but merely, as is alleged, overheard it. He was in nowise interested in it, and it is to be presumed that Partridge would remember it far better than he. If Berry would indeed swear that the conveyance to

Perkins v. Partridge.

Thomas H. Phillipps was merely voluntary, and for the purpose of vesting the latter with the title to the property so that he could give a mortgage on it for Bouton & Phillipps (Dewitt H. Phillipps) to assume in the conveyance to them, he would testify in direct contradiction of Charles Partridge, for he testified that the sale to Thomas H. Phillipps was a *bona fide* sale. His testimony on that point was, that he sold the property to Thomas H. Phillipps, and took the \$7,000 mortgage as part of the consideration; that the latter thought he could make something out of the purchase; that he (Partridge) made no agreement with him otherwise than to sell the property to him; that he could not say that he offered to sell it to any one before he sold it to Thomas H. Phillipps; that the transaction with Bouton & Phillipps was considerably subsequent to the sale to Thomas H. Phillipps; that after he had conveyed the property to Thomas H. Phillipps he had an opportunity to sell it, and, as Phillipps had not yet sold it, he paid him something to convey it to Bouton & Phillipps. He testified that, on the conveyance to Thomas H. Phillipps, the latter paid him \$10 or \$15, besides giving the mortgage, and, in voluntary explanation of this, he said he desired to say that that money was not the full amount which Phillipps was to pay him for the property, and he immediately added, in answer to a cross-question, that the consideration which Phillipps was to pay for the property, had he kept it, was, he thought, some \$15 or \$20 an acre. This testimony is utterly at variance with what it is proposed to prove by Berry.

As to Bouton, the petitioner shows no diligence to procure his testimony. He obtained his knowledge of his whereabouts from Dewitt H. Phillipps, Bouton's late partner, and he knew at all times during the trial where Dewitt H. Phillipps was to be found. He proposes to prove by Bouton that Bouton & Phillipps assumed the \$7,000 mortgage, but Dewitt H. Phillipps could have proved that just as well. He also proposed to prove by Bouton that he received the interest on the \$7,000 mortgage from Bouton & Phillipps. But

Perkins v. Partridge.

Charles Partridge so testified. It is true the receipts on the bond, in his own handwriting, appeared to contradict him, showing that he received the interest from Thomas H. Phillips, but he swore that the interest was paid by Bouton & Phillips.

The petition contains a copy of a statement of account between Bouton & Phillips and Charles Partridge, said to have been made by the former, showing how the interest due in September, 1874, was paid. It may be presumed that Dewitt H. Phillips could have proved the transaction, for it was a firm transaction. By the statement, it appears that the interest was, all but \$52.55, paid by an offset of the interest which Charles Partridge was bound to pay on two mortgages of \$2,500 each, but Charles Partridge testified that Bouton & Phillips paid the interest in cash or by checks. Nor would the production of the deed to Bouton & Phillips be of any importance in the cause. A copy of it was offered in evidence, apparently without objection, and was used on the hearing. The defendants might have proved the loss of it by Dewitt H. Phillips. He could have sworn as to the assumption, also, if any there was. Bouton, it appears, from his letter copied into the petition, does not remember distinctly whether his firm assumed the payment of the mortgage or not. The defendants gave evidence as to the commercial standing of Bouton & Phillips. Charles Partridge swore to it. They might have offered more had they seen fit to do so.

There is no new matter shown which would entitle the petitioner to leave to file a bill of review. Indeed, there is no new matter at all.

The petition will be dismissed, with costs.

Smith *v.* Smith's administrator.

JOHN E. SMITH

v.

ADMINISTRATOR OF JOHN SMITH, deceased, and others.

1. The note of a donor is not the subject of a gift.

2. From the mere fact that a child renders service to a parent, the law will not imply a promise to pay. As between them, an express promise must be shown, or circumstances from which a promise must necessarily be implied.

3. This court has power to decree the surrender and cancellation of a worthless negotiable instrument, though a complete defence at law exists; but, to justify a resort to this court, it must appear that the defence at law will be attended by uncertainty, or that the surrender of the instrument is necessary to full relief, or that the person who alone has the right to defend is under a strong bias in favor of the plaintiff.

On final hearing, before the vice-chancellor, on pleadings and upon proofs taken before him.

Mr. H. B. Herr and *Mr. G. A. Allen*, for complainant.

Mr. John N. Voorhees, for defendants.

THE VICE-CHANCELLOR.

The complainant seeks, by this suit, to restrain the prosecution of certain suits at law, and to compel the surrender and cancellation of the promissory notes on which those suits are founded.

John Smith, of Readington township, Hunterdon county, died intestate, March 19th, 1875. For some years prior to his death his family consisted of himself, two unmarried daughters and a son. On the 13th of March, just six days before his death, and while he was suffering from the sickness of which he died, he made the notes in controversy, being one to each of his three children living at home.

Smith v. Smith's administrator.

They were each for \$600, payable to the payee or bearer, at one year, without interest, and were drawn at the intestate's request, by a neighbor and friend, who subsequently administered upon his estate. At the time the notes were signed, the intestate requested the person who drew them to administer upon his estate in case he was taken away. No settlement or accounting preceded the making of the notes, nor was there any conversation between the intestate and the payees respecting any debt due from him to them. They had given him their service, and he had maintained them. The intestate told the person who drew the notes that he wanted him to do some writing for him; that he had no will, and he could do what he wanted to with notes. He further said, the children to whom the notes were made had stayed with him, and he wanted to do something for them; that he wanted the notes made strong, so they would stand the test; that he owed it to them, it was right, and he wanted them to have them. The notes were then drawn and signed by the intestate, by his mark, and delivered to one of the payees.

After the intestate's death, the notes were returned to the person who wrote them, and he then added an attestation clause to each, and signed them as subscribing witness. The intestate left seven children, of whom the complainant is one. Four of them, very shortly after they were notified of the existence of the notes, objected to their payment. Actions were subsequently brought against the administrator, and the main purpose of the present suit is to have those suits perpetually enjoined.

If the notes were intended as gifts, they are of no more value than blank paper. This is the settled law of this state.

Mr. Justice Van Syckel, speaking for the court of errors and appeals, in *Voorhees v. Woodhull's ex'rs*, 4 Vr. 494, 498, said: "The note of the donor is not, like the note of a third person, the subject of a gift. It is a mere promise, and can no more be recovered upon as a gift than the unwritten promise of the donor." The evidence leaves no room to doubt

Smith v. Smith's administrator.

that the notes were intended as gifts. The drawer manifestly meant they should operate as testamentary acts. He said he had no will, but he could do what he wanted to with notes. It is true, he also said that he owed these children; but what did he mean? Is it certain he did not refer to a claim upon his bounty or affection, rather than a legal obligation? He said, in the same connection, that he wanted to do something for them, and then proceeded to select a person to administer his estate. He was not settling with his creditors, but directing the distribution of his estate. No attempt was made to prove an express contract, and no circumstances were shown which afford the slightest ground for presuming a contract between parent and child. Ordinarily, the law presumes a promise to pay from the mere fact that valuable services have been rendered and accepted, but no such presumption arises when the service is rendered by a child to its parent. Between them, to entitle a child to compensation, an express promise must be shown, or circumstances must be proved from which a contract to pay must necessarily be implied. *Ridgway v. English*, 2 Zab. 409.

There is nothing in the evidence which induces the belief that the parties understood, at the time the notes were made, that the relation of debtor and creditor, or employe and employer, existed between them; but, on the contrary, the circumstances show, quite clearly, that the intestate intended the notes as mere expressions of his bounty. The payees have not attempted, by their own oaths, to show an express contract, or any circumstances from which a promise to pay can be inferred. The weight of the evidence proves that, soon after the testator's death, the person who wrote the notes stated that the intestate intended the notes should be surrendered to him in case he recovered. That was, obviously, a part of the scheme. He manifestly intended that each of the three payees should have \$600 more of his estate than the other children, in case he died; but he did not intend to become their debtor in these sums

Smith v. Smith's administrator.

in any event. My conclusion is, the notes are of no legal force.

The power of this court to decree the surrender of an invalid or worthless bond, or other instrument, even though a complete defence at law exists, cannot be questioned at this day. If a suit at law has already been brought, this court will not arbitrarily or causelessly change the forum of litigation, but if adequate relief cannot be given at law, or if the defence is of a character that cannot be urged at law without embarrassment and hazard, this court will take jurisdiction and give suitable relief. *Cornish v. Bryan*, 2 *Stock*. 146. "The resort to equity, to be sustained," said Chancellor Kent, "must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper, and clear of all suspicion of any design to promote expense and litigation." *Hamilton v. Cummings*, 1 *Johns. Ch.* 523. Both this court and the court of errors and appeals have declared, that a proper case for equitable relief is presented when it is shown that a suit at law is pending against the representative of a dead person, on a worthless negotiable instrument, not void on its face; for it is said the plaintiff may, when warned that his right to recover will be resisted, discontinue his suit at law, or suffer a nonsuit, defer a subsequent suit until the evidence of the defence is lost, and then sue either the personal representative, or the heir, or devisee, and recover upon mere proof of the papers. In such a case it is obvious no relief short of the destruction or cancellation of the instrument affords full protection. *Mettler's adm'rs v. Mettler*, 3 *C. E. Gr.* 270; *Mettler v. Mettler's adm'rs*, 4 *C. E. Gr.* 457.

These adjudications must rule this case. The equities of the present complainant are much stronger than were those of the suitor in the case just cited.

Smith v. Smith's administrator.

In that case the person seeking relief in this court was the defendant in the suit at law, and held a position where he had full right, and could have had ample opportunity to defend at law. Here the complainant is not a party to the suit at law, and is powerless to control or direct the defence. A recovery at law will protect the administrator and conclude the complainant, unless he can show fraud. *Pursel v. Pursel*, 1 *McCart*. 514. The administrator is necessarily under a strong bias in favor of the validity of the notes. He drew them, witnessed their execution, and knows better than any other person their origin and history. If they are not the device of his mind, he sanctioned the validity of the scheme of which they are the offspring. He thought they would answer the purposes of a will, and the payees aver, in their answer, that he told them he personally knew them to be all right. In the account he filed, exhibiting the condition of the estate, as preliminary to an order for the sale of lands for the payment of debts, he reported them as valid debts—at least he did not report that they were disputed. He subsequently carried them, at the request of the payees, to his own counsel, to have suits brought on them. It is easy to see, in this situation of affairs, that his pride of opinion, his friendship for the payees, and his desire to see the wishes of his dead friend respected, all stand arrayed against his making a vigorous resistance to a recovery on the notes. He occupies a position where, if the defence is committed solely to his direction, he must either betray his convictions of what he believes to be right, and desert his friends, or be faithless to duty. The complainant has, I think, a clear right to be protected against the mishaps and dangers which would almost unavoidably attend a defence conducted by a person thus situated, and which, if once suffered, would, most probably, be beyond judicial cure. A decree will be advised, perpetually enjoining the suits at law, and directing the surrender of the notes for cancellation.

The plaintiffs in the suits at law must pay the complainant's costs.

Ogden v. Thornton.

ELLEN E. OGDEN

v.

SAMUEL C. THORNTON.

1. The validity of a deed must be determined by facts existing at the time of its execution ; it cannot be vitiated by facts arising *ex post facto*.

2. A court of equity must always aim to act upon broad principles of justice, disentangled as much as possible from little technicalities.

3. The court has power to order an amendment even on final hearing. but it is a power never exercised except when the ends of justice render it absolutely necessary, and its exercise will not abridge the right of defence.

4. An appellate tribunal will sometimes reverse a decree and send a cause back to a court of original jurisdiction, in order that an amendment may be made so that the real merits of the controversy may be settled.

5. An acknowledgment of the payment of the purchase-money in the body of the deed, or by a receipt, will not operate as a waiver or discharge of the vendor's lien, if the purchase-money has not, in fact, been paid.

On final hearing on bill, answer and proofs.

Mr. J. A. Fay, for complainant.

Mr. Frederick Voorhees and *Mr. Peter L. Voorhees*, for defendant.

THE VICE-CHANCELLOR.

The primary purpose of this suit is to set aside a deed made by the complainant to the defendant, bearing date April 14th, 1858. The suit is by a sister against her brother. The parties are the only children of Dr. Samuel C. Thornton, of Burlington county, who died intestate, March 19th, 1858. At the time of his death he owned a house and lot in Moorestown, worth about \$8,000, which he

Ogden v. Thornton.

had occupied for many years as his homestead. He left a widow, who survived him until May, 1865. The deed in controversy conveyed the daughter's interest in this property. The bill charges that the defendant procured the deed by fraud. It avers that the complainant, at the time of its execution, was without knowledge or experience in business affairs, and reposed the utmost confidence in the integrity and honor of her brother; that he represented to her that a conveyance to him was necessary as a matter of form, to enable him to manage the property, and to prevent its being sold at a sacrifice; that he promised her that he would see that her rights were protected, and that she received her full share of her father's estate; that he paid her nothing then or afterwards, and now denies her right to the land, and also for compensation for its value. It will be observed that the bill does not allege that any price or sum, or other equivalent, was agreed upon as a consideration. It simply presents a case of blind confidence on one side, and of base betrayal on the other. If the complainant's own evidence could, by any rational interpretation, be held to establish the case made by her bill, her right to the relief she asks would be undeniable.

There is much in the defence tending very materially to support the case made by the bill; indeed, so strong is its general drift in that direction that, had even a meagre case been made on the part of the complainant in support of the allegations of her bill, I think quite sufficient would have been found in the evidence of the defendant to have completed a case so strong in its palpable equities as to have entitled the complainant to the highest measure of relief it was in the power of the court to give. But the complainant's own evidence completely sweeps away the main fact on which her right to relief on the ground of fraud rests. She frankly admits, in her direct examination, that her conveyance was made in pursuance of a contract with her brother, which provided for a full and fair consideration. She says he agreed to give her his share of their father's

Ogden v. Thornton.

books of account; also his share of their mother's real and personal estate, and also his share of the real and personal estate of their maiden aunt, who had long been a member of their family. She is still living. The deed states a consideration of \$3,000, and reserves to the complainant the right to occupy and enjoy the premises described, as a home, jointly with her brother, until her marriage. She was under a promise of marriage when the deed was made, and was married in February, 1861. The property was conveyed subject to her mother's right of dower, and was at that time, according to the clear preponderance of proof, worth \$8,000.

The defendant, by his answer, says that \$3,000 was agreed upon by his sister and himself, after consultation with their mother, as the full and fair value of his sister's interest. Making such deductions for the value of the dower and the right reserved as persons in their situation would be likely to make, the consideration expressed in the deed undoubtedly represented what they believed to be the fair value of the complainant's interest. And such valuation was unquestionably adequate.

The validity of a deed must be determined by facts existing at the time of its execution; it cannot be vitiated by facts occurring subsequently. The evidence leaves no doubt that the defendant, after he got title, made up his mind to defraud his sister of the consideration he had agreed to pay. His purpose, in this respect, is made painfully conspicuous in his attempt to show that she has already received a full equivalent for her conveyance. He says she has received the half of her mother's estate, and she could have received, if she would, the use of the other half. And this he calls an equivalent. Her mother died intestate, and the complainant was therefore entitled, in her own right, and without his favor or assent, to half of her estate. The defendant drew a will for his mother some months before her death, which she never executed, by which the complainant was given the income of her mother's estate during life, with remainder to her children, if she left any, and if not, then

Ogden v. Thornton.

to the defendant. According to the decided weight of the proofs, this disposition of the mother's property was a fraud upon the complainant, under both the arrangement which it is said was made by the defendant with the complainant, and that by the mother with the daughter. But, independent of any question as to a pre-arrangement respecting the disposition of the mother's property, the statement as to what he considers an equivalent for his sister's conveyance manifestly does more credit to his hardihood than it does to his sense of justice or love of truth, and displays, with almost offensive boldness, a purpose to hold his sister's property without paying for it. But a purpose on the part of a purchaser to defraud his vendor of the purchase-money, conceived long after title has passed, affords no ground whatever for nullifying his deed. If a deed is valid when it is delivered, it remains so forever. It is clear the court is powerless to give the complainant relief of the precise nature and extent she asks.

But I regard it as equally clear that, though the court cannot give her just the relief she asks, it is not driven, by any inflexible rule of practice or stern deference to a mere formality, to the hard duty of thrusting her from its presence remediless and mulcted in costs, though fully persuaded she has, upon the undisputed facts, a case founded in the highest equity, and which it is the peculiar duty of a court of conscience to recognize and redress. Such a result would prostrate justice to preserve a mere matter of technical form. If possible, the court must not allow justice to be defeated and wrong to triumph, by a mere mistake or unskillfulness in pleading. A court of equity must always aim to act upon broad principles of justice, disentangled as much as possible from little technicalities. *Cooper's Eq. Pl.* 340.

There can be no doubt, upon the facts of this case, about which there is no ground for controversy or doubt, that the complainant is entitled in equity to a lien upon the lands conveyed for unpaid purchase-money. It is undisputed that she made a conveyance of lands to the defendant; that

Ogden v. Thornton.

neither party understood it was by way of gift, but that she was to receive an equivalent, and that nothing has been paid or given. In other words, it is admitted the defendant has acquired title to the complainant's lands upon an implied promise, at least, that he would pay her for them, but so far has paid nothing, and still holds the lands. By his answer, the defendant alleges that \$3,000 was agreed upon, at the time of his purchase, as the full and fair value of the lands, and by his testimony he admits that he has never paid a penny for them, either in money or other thing of value. These facts exhibit a perfect case of equitable lien.

The bill as at present framed, it must be admitted, is defective as a bill to establish and enforce a vendor's lien. Stripped of its accusations of fraud, it merely alleges a conveyance by the complainant to the defendant, a promise by the defendant to protect the complainant's interest, and to see that she received her full share of her father's estate, and the further fact that the defendant has not paid for the lands. It will be observed that its material defect is an omission to aver that a price or sum was agreed upon as the consideration or purchase-money. But this fault, I think, may be cured, according to well-settled rules of practice, by amendment. The power of the court to order an amendment, even on final hearing, is unquestionable, but it is a power never exercised, except when the ends of justice render it absolutely necessary, and its exercise will not substantially impair or abridge the right of defence. *Howell v. Sebring*, 1 *McCart*. 84; *Midmer v. Midmer's ex'rs*, 11 *C. E. Gr.* 299. In *Hill v. Filkin*, 2 *P. Wms.* 12, Lord Macclesfield, of his own motion, ordered a bill to be amended on final hearing, so as to raise an entirely new issue. Even appellate tribunals will reverse an order or decree and send a cause back to the court having original jurisdiction, in order than an amendment may be made, so that the real merits of the controversy may be settled. *Kuhl v. Martin*, 2 *Stew.* 586; *Walker v. Armstrong*, 8 *DeG. M. & G.* 534; *Lewis v. Darling*, 16 *How.* 6; *Lum v. Winn*, 4 *Desauss.* 66.

Ogden v. Thornton.

Where, upon final hearing, the court has the whole case before it, but is embarrassed by defects in the pleadings, it may permit both the bill and answer to be amended. *Story's Eq. Pl.* § 905.

This power has been repeatedly exercised by this court. In *Davison v. Davison*, 2 *Beas.* 246, the complainant grounded his right to relief on a contract which he set out specifically in his bill, but by his proofs he established a contract materially different. The court, on final hearing, allowed him to amend so as to make the allegations of his bill correspond with his proofs, and then decreed the relief he was entitled to upon the bill as amended.

In *Armstrong v. Ross*, 5 *C. E. Gr.* 109, the complainant was permitted, on final hearing, to amend his bill, so as to change it from an ordinary foreclosure bill to a bill to establish and enforce a vendor's lien, and to take a decree on the bill as thus amended. The mortgage in this case was void because not properly acknowledged by the mortgagor. She was a married woman. A similar amendment had previously been permitted in *Wilson v. Brown*, 2 *Beas.* 277, a case substantially like that of *Armstrong v. Ross*. This course is obviously right when a change in the bill is indispensable to the accomplishment of justice, and can be made without the slightest harm or injustice to the defendant. That is the case here. The defendant's case is fully before the court. The bill, as at present framed, compelled him to put in evidence every fact, and to resort to every means of proof that he could possibly have deemed necessary if the bill had been framed to establish a vendor's lien. He has been freely heard, and, giving him the utmost benefit of every consideration that can, with any show of reason or fairness, be urged on his behalf, he stands utterly defenceless against the fundamental equity of his sister's claim, viz., that he has obtained title to the property without giving her an equivalent for it. The only shield he attempts to interpose against a just liability is a mere technicality. In my judgment, the complainant should be allowed to amend.

Ogden v. Thornton.

I cannot accept, as entirely trustworthy, the complainant's statement as to what she was to receive as the consideration for the conveyance. Her failure to demand, promptly, her brother's share of the sum collected on her father's books, and likewise to insist, within a reasonable time after her mother's death, that her brother should transfer to her his share of the mother's estate, tends very strongly, in my view, to cast doubt and discredit on the accuracy of her recollection. Besides, she has been very tardy in seeking relief. Her deed was made in 1858; she left her brother's house in 1861; her mother died in 1865, and this suit was not brought until October, 1873. After this great lapse of time, I am not satisfied that she is able to reproduce, with anything like trustworthy accuracy, all the material details of a bargain, in the negotiation of which, it is quite evident, she trusted very largely to the judgment and affection of her brother and her mother. But the evidence, I think, shows conclusively that, at that time, the fair value of her interest in the lands conveyed was \$3,000; that is the consideration specified in the deed, and which, the defendant says, was agreed and fixed upon as the fair value of the interest conveyed to him. He can find no fault if he is required to pay a price he admits he assented to as just and fair. The complainant's recovery must be limited to that sum (\$3,000), with interest from February 1st, 1861. From the date of the deed up to the time just mentioned, the defendant furnished the complainant with food, and although no express promise to pay for it is shown, it is quite obvious, from the relation of the parties and the other circumstances of the case, that neither party meant that interest should run on the purchase-money while the defendant was furnishing the complainant with her food.

At the time the deed was executed, the complainant receipted for the purchase-money at the foot of the deed. Nothing, however, was paid. The receipt does not affect the complainant's lien. An acknowledgment of the payment of the purchase-money in the body of the deed, or by

Williams *v.* Vreeland's executors.

a receipt endorsed on the deed, will not operate as a waiver or discharge of the vendor's lien, if the purchase-money has not, in fact, been paid. 1 *Lead. Cas. in Eq.* 484.

After the bill shall have been amended, a decree will be advised establishing the complainant's lien as vendor against the lands conveyed, and directing payment, and, in case default shall be made, that the lands be sold. The complainant is not entitled to costs. Had she exhibited the case on which she now recovers, it is probable all litigation would have been avoided, or, at least, its delay and expense would have been greatly diminished. Of course, if the defendant fails to perform the decree by making payment, he must pay the costs incident to its enforcement.

SARAH A. WILLIAMS and others

v.

CORNELIUS VREELAND'S EXECUTORS and others.

1. The competency of a witness in a suit in equity, depends entirely upon his qualifications at the time he is examined, and not on the condition of the suit as to parties at the time the hearing takes place.

2. The sixth section of the act concerning evidence only renders a complainant, otherwise incompetent, competent to a limited extent, and does not allow him to testify generally. His evidence must be limited to the disproof of so much of the defendant's answer as is responsive to the allegations of the complainant's bill.

3. As a general rule, evidence which is merely incompetent or irrelevant will not be suppressed prior to final hearing, but evidence which is scandalous, or has been taken irregularly or imperfectly, or in violation of the privileges of either of the parties, may be.

On motion to suppress depositions.

Williams v. Vreeland's executors.

Mr. B. A. Vail, for motion.

Mr. W. H. Vredenburg, *contra*.

THE VICE-CHANCELLOR.

This is a motion to suppress the evidence of two of the complainants. The suit was originally brought by Sarah A. Williams and Margaretta Taylor, and two others, against Cornelius Vreeland and Jane Folk, and six others. Vreeland and Folk both died after they were in court, but before the time for answering had expired. They each left a will, and their executors, after obtaining letters testamentary, were made defendants, and have answered. The complainants, Sarah A. Williams and Margaretta Taylor, were subsequently examined as witnesses on their own call, and against the defendants' objection. The defendants now move to suppress their testimony, on the ground that it is incompetent.

Incompetent evidence is either such as proceeds from the mouth of a person not qualified to speak as a witness, or such as is not the fit and appropriate means, according to legal rules, of proving or disproving the fact in dispute.

The competency of a witness, in a suit in equity, depends entirely upon his qualifications at the time he is examined. If the condition of the suit, as to parties, at the time he is examined, is such as to render him competent, his testimony may be read at the hearing, though in the interval between his examination and the hearing, the suit may have been so changed in parties that he could not be called as a witness at the time the hearing occurs. *Marlatt v. Warwick*, 3 C. E. Gr. 108, S. C. on appeal, 4 C. E. Gr. 439; *Walker v. Hill's ex'rs*, 7 C. E. Gr. 513. At the time the complainants were examined they were prosecuting the suit against three defendants, who were defending in representative capacities. The complainants were, therefore, disabled, by the letter as well as by the spirit of the statute, from calling themselves to testify generally as witnesses in the case (*Rev.* p. 378, § 3).

Williams v. Vreeland's executors.

The defendants had not removed the disability of the complainants by calling themselves to testify. Under the sixth section of the act concerning evidence (*Rev. p. 379*), the complainants are competent witnesses to a limited extent—"to disprove so much of the defendant's answer as is responsive to the allegations of the complainant's bill," but their evidence can go no further. They are competent only to a qualified extent, and not generally. *Lanning v. Lanning*, 2 C. E. Gr. 228; *Marlatt v. Warwick*, 4 C. E. Gr. 439. It is neither necessary nor proper, at this point in the litigation, to decide whether the complainants have, by their evidence, exceeded the statutory limit. That question will present itself regularly at the final hearing, and can then be much more properly and conveniently considered than at present.

The question whether the testimony of a particular witness shall be suppressed prior to final hearing is one of discretion entirely (*Underhill v. Van Cortlandt*, 2 Johns. Ch. 339; *Brown v. Bulkley*, 1 McCart. 294; 1 Dan. Ch. Pr. 951, note 1); but, as a general rule, where the application to suppress, rests alone on the ground of incompetency or irrelevancy, the court will deny it and let the matter stand for adjudication on final hearing (*Brown v. Bulkley*, *supra*; *Wood v. Chetwood*, 12 C. E. Gr. 311; 1 Hoffm. Ch. Pr. 495; *Williamson v. More*, 1 Barb. 229). A different course of practice prevails where the deposition contains scandalous matter (1 Dan. Ch. Pr. 951); or the deposition has been taken before an unauthorized person (*Barnet v. Day*, 3 Wash. C. C. 244); or before a person who was authorized but should not have been—for example, the solicitor of one of the parties (*Gres. Eq. Ev.* 220); or where it has been taken without notice (*Honore v. Colmesnil*, 1 J. J. Marsh. 520); or discloses confidential communications which are privileged (*Sandford v. Remington*, 2 Ves. 189); or where a witness fails or refuses to answer a question (*Richardson v. Golden*, 3 Wash. C. C. 109); or where testimony is elicited by a leading question, or is read from a paper prepared by the

Stilt v. Hilton.

solicitor of the party on whose behalf the witness is called (*Gres. Eq. Ev.* 57, 220). In these cases, suppression will be ordered.

The present application is premature, and, on that ground, must be denied.

JOHN W. STILT

v.

HENRY HILTON, WILLIAM LIBBEY, CORNELIA M. STEWART,
and others.

1. Where the facts on which the equity of a bill rests are positively and explicitly denied by the defendant on his personal knowledge, as a general rule the defendant is entitled to a dissolution of the injunction.

2. To exempt a case from the operation of the general rule, it must appear that a dissolution will deprive the party holding the injunction of all relief, in case he is finally successful, or that a dissolution will subject him to some other irreparable injury, or place him in a position of peculiar hardship.

On motion to dissolve injunction, heard on bill and affidavit, and answer and affidavit.

Mr. Thomas N. McCarter, for motion.

Mr. R. W. Parker and *Mr. Cortlandt Parker*, *contra*.

THE VICE-CHANCELLOR.

The injunction the defendants seek to have dissolved, enjoins the defendant, Henry Hilton, from further prosecuting an action of ejectment brought by him against the complainant to recover certain lands in the county of Essex. These lands, with others, were conveyed by the complainant to Alexander T. Stewart, November 3d, 1875. Hilton has

Stilt v. Hilton.

since, in due form, been invested with Stewart's title. In 1870 the complainant was extensively engaged in the manufacture of woolen goods, having two mills at Little Falls, New York, one called the Mohawk and the other the Elbœuf, and another at Franklin, New Jersey, known as the Yantico. He carried on business in connection with Benjamin Underhill, his copartner, under the name of Stilt & Underhill, but the title to the real estate used for the purposes of the business, as well as that now in controversy, was held by the complainant.

About the 1st of February, 1870, A. T. Stewart & Co. consented to become the factors of Stilt & Underhill, and by a written contract, bearing date February 8th, 1870, agreed to receive all the productions of their mills, to make advances to the extent of seventy-five per cent. of the market value of the goods delivered, charging interest thereon at the rate of seven per cent. per annum, and to make sales and guaranty payment for seven per cent. of the gross amount of sales. The contract stated that the commission for selling should be three and a half per cent.; for guaranteeing, two and a half; and for charges, one. It further provided, that the factors should render monthly accounts of sales and weekly statements, and that either party should be at liberty to put an end to the contract at any time by giving written notice to the other. This arrangement continued until June, 1874.

On the 23d of June, 1874, Stilt & Underhill, by letter, directed A. T. Stewart & Co. to account to them for all sales, on a uniform basis, or at one general rate, viz. : As though all sales were made on a credit of thirty days, with a discount of five per cent. to the buyer, though they may, in fact, have given a much larger credit, and consequently made no discount at all to the buyer, or much less than that appearing on the account. The defendants say the commission of two and a half per cent. for guaranty was based on an understanding that all sales were to be made on a credit of six months, the buyer having a right to pay at any

Stilt v. Hilton.

time before maturity, and to be allowed a discount of one per cent. a month for the period his payment should anticipate the maturity of his bill.

By a letter dated July 1st, 1874, Stilt & Underhill authorized A. T. Stewart & Co. to give buyers extra time, and allow them a discount at the same rate for such additional time. These arrangements continued in force up to October 25th, 1875, a business having been transacted under them aggregating a value of over \$4,000,000.

The account of A. T. Stewart & Co. at this time showed a large balance against Stilt & Underhill, greatly in excess, as the defendants say, of their security, and they therefore required Stilt & Underhill either to pay or to give them additional security. This demand was met by a letter from the complainant, bearing date October 23d, 1875, proposing to pass over to A. T. Stewart & Co. all the goods in their hands and the Mohawk and Elbœuf mills, with their contents, in payment of the balance standing in their favor, they to pay the complainant, in addition, \$130,000, and assume the payment of the amount then due on the pay-rolls of the mills, amounting to \$12,000 or \$13,000. This offer was not accepted. Subsequently the complainant signed a contract, bearing date October 25th, 1875, whereby, after admitting an indebtedness by Stilt & Underhill to A. T. Stewart & Co. of over \$1,123,000, he agreed to convey to Alexander T. Stewart the three mills already mentioned, together with the lands connected with them; also all his lands in New Jersey and New York, and also to transfer to Mr. Stewart all the wool stock on hand, whether manufactured or unmanufactured, on condition that the same should be managed, controlled and sold according to the best judgment of A. T. Stewart & Co., and the proceeds applied in discharge of the debt due to them from Stilt & Underhill. The contract also stated that Stilt & Underhill were indebted to other persons in the sum of \$130,000, and directed that these debts should also be paid out of the proceeds of sale of the property to be conveyed and transferred to Mr.

Stilt v. Hilton.

Stewart, and that if any surplus remained after the payment of the debts designated and the expenses of the conversion, it should be paid to the complainant. At its conclusion the contract stated that it was made upon condition that the indebtedness of Stilt & Underhill to others than A. T. Stewart & Co., did not exceed \$140,000. The lands in controversy were conveyed by the complainant in execution of this contract. Neither Alexander T. Stewart nor his firm signed the contract; they, however, took possession of the property made over under it, made some of the payments required by it, and sold some of the property.

The defendants say it was very soon found that the debts of Stilt & Underhill to others than themselves were much greater than they had been represented to be, and that they at once, on discovering this to be the fact, notified the complainant that they would not, in consequence of his misrepresentation, carry out the contract, and offered to reconvey his property on being paid the amount due to them, including the sums they had paid out under the contract. The defendants also say the complainant met this offer with an expression of regret that he had been so much mistaken in his estimate of his debts, and declared his inability to pay them what he owed them, and then proposed to release all claim to the property already made over, on condition that the defendants should pay all his debts, which he then represented to be \$220,000. This proposition was reduced to writing by the defendant Hilton, and sent to the complainant by his copartner, who procured the complainant's signature to it and then signed it himself. This paper bears date December 14th, 1875. By it the complainant, after stating that it was plain the agreement of October 25th, 1875, could not be carried out in consequence of his debts being much larger than he had supposed they were, and that it was impossible for him to accept a reconveyance upon the terms proposed, submitted a proposition in these words:

"I therefore propose, and now declare, that our original plan and arrangement shall be cancelled and annulled; that you shall hold the

Stilt v. Hilton.

property so transferred and conveyed to you, free from any claim whatever, of either myself, my firm or anybody else; that I and my firm will execute and deliver such releases and other papers as you may consider advisable to effectuate this purpose, and that, as a consideration for this, you shall continue to advance the moneys necessary to pay my indebtedness to all my creditors except yourselves."

This paper also contained an assurance, quite as strong as words could make it, that the debts of Stilt & Underhill to others than the defendants did not exceed \$220,000.

The defendants also allege that, inasmuch as it was perfectly manifest they must, under any circumstances, suffer great loss in consequence of their large advances to Stilt & Underhill, and the proposition of the complainant giving them, as they thought, the best means possible of mitigating their loss, they accepted it, and afterwards paid out, in fulfillment of its terms, over \$76,000.

If the papers in the case accurately express the intention of the parties, it would seem to be clear that the right of the plaintiff in ejectment to the possession of the lands in controversy was unquestionable. Although originally conveyed subject to a trust, the terms of the trust gave the complainant no right to possession. When he divested himself of title, all right to possession, equitable as well as legal, passed with it, and he ceased to have any right in respect to the lands, except to have the trust faithfully executed. The special equity, however, upon which the complainant puts his right to retain possession is, that all the contracts between himself and the defendants mentioned in his bill, except the first, were procured from him by means which render them of no force or effect. He does not deny that the defendants have conducted their business and kept their accounts strictly in accordance with the terms of the contracts, but he charges that the contracts were obtained by fraud and coercion. He says the letter of June 23d, 1874, directing A. T. Stewart & Co. to account for all sales at one general rate of discount, or as though all sales were made on a credit of thirty days, was sent to him with a

Stilt v. Hilton.

demand that he should sign it; that he at once took it to the defendant, Libbey, and inquired what it meant, and was told that it was intended to cover charges for extra interest; he says he then said he would not sign it, and that Libbey thereupon replied, if he did not, A. T. Stewart & Co. would at once cut off all further advances. He says, at that time he was unable to find his copy of the first contract, bearing date February 8th, 1870, and therefore believed he had no proof in writing of the original understanding; that his firm was then largely indebted to A. T. Stewart & Co., and being, as he thought, entirely at their mercy, he believes, after protest for some days, he or his partner signed it. Though he says he at first positively refused to sign this paper, and for some days afterward resisted the force employed to coerce him to sign it, yet he also says it did not make much impression upon his mind at the time, and for that reason he did not look into the accounts, nor get a correct apprehension of the hardship of the bargain until long afterwards. He attempts no explanation of his letter of July 1st, 1874, though it was manifestly intended as a mere extension or appendage to the arrangement established by his letter of June 23d, 1874. If the letter of July 1st was the voluntary expression of his will, it will be very difficult to believe that that of June 23d was not.

With regard to the contract of October 25th, 1875, and the conveyances made in fulfillment of it, the complainant charges that they were executed without the advice of counsel, and when he was so sick and weak, and so completely prostrated, as to be incompetent, both mentally and physically, to transact business of any kind. He further says that he was told by the defendant, Hilton, not to employ counsel; that he would draw all the papers for both parties that were necessary; that the deeds were taken merely to satisfy Mr. Stewart, and, as the property was an ample security for the debt, the transfers were, at most, but a mere temporary expedient. After the execution of the

Stilt v. Hilton.

deeds, he says he continued "nervously prostrated," and unable to do *much* business, and, while in this condition, and when he was sick in bed, a new agreement was sent to him, which he was told he must sign or A. T. Stewart & Co. would let the business paper of Stilt & Underhill go to protest. He also says that he signed the new agreement without reading it, and that immediately thereafter A. T. Stewart & Co. took possession of the mills, and assumed the exclusive management of the business. He gives no information respecting this paper, further than to say that he supposed it was designed to put the business of Stilt & Underhill further under the control of A. T. Stewart & Co. So far as appears, he has never asked to see it, or to be informed of its contents. His want of curiosity as to the character and effect of this paper can only be accounted for by believing either that he knows more about it than he pretends he does, or that he has been most unnaturally indifferent respecting the consequences of his own acts. Granting it to be possible that the threat alleged to have been made at the time he was required to sign did not, in consequence of his weakness, provoke his resistance or prompt him to make a careful examination of the paper, still, if he was, in fact, ignorant of the authority under which the defendants claimed to act, it would seem to be almost beyond belief that, after his strength was restored, and he found the defendants in the possession of his property, doing with it whatever they willed, regardless of his rights, he should have permitted them to continue in the full enjoyment of it without questioning their right or even asking to know by what authority they justified their acts. His unconcern respecting the use and management of the property could not have been greater if he had been entirely satisfied he had no interest whatever in it.

The defendants have met every material averment of the bill upon which the complainant's right to an injunction rests, by a positive and explicit denial. Their denials are made upon personal knowledge, and embrace a circumstan-

Stilt v. Hilton.

tial history of each transaction displayed by the complainant as the foundation of his equity. The facts exhibited by the defendants leave the complainant's case destitute of the slightest equity, and place him in a position where his conduct requires explanation and defence. According to his own statement, he stood quietly by, after he had signed a paper which he supposed was intended to place his property more completely under the control of the defendants, and allowed them to pay out over \$76,000 of their moneys in discharge of his debts. If, at that time, he meant to repudiate his act, but remained silent and apparently acquiescent, so as to gain the advantage that would flow to him from the performance by the defendants of their part of the contract, he has committed a very mean fraud upon the defendants, and has no right to ask the court to exercise its prohibitory power in his behalf.

It is quite unnecessary to repeat or even summarize the facts exhibited by the defence. It is enough to say the papers in the case, as well as the complainant's conduct, raise strong doubts as to the truth of his story and the purity of his motives. It seems almost incredible that a man of mature years, and of large business experience, who for fifteen years had stood at the head of a large manufacturing establishment, where he was constantly controlling the action of others, could, in the first place, be dragooned into signing a contract he never made, and that he would immediately afterwards, for over a year, submit unresistingly to the exactions made under it, and that he would, at last, when the catastrophe of the plot was reached, yield up everything without a struggle or the least demonstration of resistance. It is not pretended that the fairness or validity of the arrangement of June 23d, 1874, after its execution, was ever the subject of discussion, or even of consideration, by the parties; nor is it claimed that the complainant ever, in any way, challenged the validity of the arrangement of December 14th, 1875, until after he was required to surrender the possession of the lands now

in dispute. On this motion it is impossible not to regard the complainant's conduct as decisive evidence in favor of the integrity of the papers under which the defendants claim.

It is proper to add, the complainant also claims that the contract of June 23d, 1874, was usurious, and must, therefore, by force of the laws of the state of New York, where the contract was made, be declared void. Conceding this to be true, it is difficult to see how it can help the complainant on this motion. For if it be true, as it now seems to be, that the defendants have, upon the complainant's promise to relinquish any claim whatever in the property, paid out a very large sum of money in discharge of his debts, it would seem to be clear that he should not be permitted, at the very threshold of his suit, to withhold from the defendants the very thing he promised to give them for their money. A court of conscience cannot permit him to keep both the thing sold and the consideration he received for it. He is the actor here, and cannot have justice until he is willing to do justice.

Where the facts on which the equity of a bill rests are positively and explicitly denied by the defendant, on his own personal knowledge, and not merely by way of argument or inference, or upon information and belief, the general rule is, the injunction will be dissolved. *Suffern v. Butler*, 3 C. E. Gr. 220; *Everly v. Rice*, 3 Gr. Ch. 553; *Boston Franklinite Co. v. N. J. Zinc Co.*, 2 Beas. 215. There are exceptions to this rule, but to relieve a case from its operation, it must appear that a dissolution will deprive the party holding the injunction of all relief, if he is finally successful, or that a dissolution will work some other irreparable mischief, or place him in a position of peculiar hardship. *Greenin v. Hoey*, 1 Stock. 137; *Scott v. Ames*, 3 Stock. 261.

This case, in my judgment, is destitute of every element necessary to exempt it from the operation of the general rule. The facts exhibited by the complainant as the warrant for the interdict of this court, have been swept away by

Watson v. Watson Manufacturing Co.

the responsive and circumstantial denials of the defendants. If the complainant shall hereafter show that his facts are true and the defendants' are false, so far as it is now possible to judge, from the facts before the court, there will be no difficulty in making the decree he may obtain effectual unto him. As the case now stands, no consideration of justice or safety appears which makes it the duty of the court to further interdict the prosecution of the suit at law.

The injunction must be dissolved, with costs.

JAMES WATSON

v.

THE WATSON MANUFACTURING COMPANY.

A drayman, who is in the regular employ of a corporation, and whose services are of a kind or class which the corporation must have in order to continue its business, is entitled to the protection given to employes by the sixty-third section of the act concerning corporations.

On petition of George Haring. Order to show cause and depositions.

Mr. R. P. Wortendyke, for petitioner.

Mr. A. B. Woodruff, for receiver.

THE VICE-CHANCELLOR.

The petitioner asks to have a debt of \$522.33, due to him from the defendants at the time this court took possession of their assets, declared a lien and entitled to preference in payment under the sixty-third section of the act concerning corporations (*Rev. p. 188*). That section declares :

"In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the

Watson v. Watson Manufacturing Co.

amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character, for, or as workmen or employes in the regular employ of such corporations."

The works of the defendants were located at Paterson, and their principal business was the manufacture of iron for the construction of bridges and buildings, and the erection of iron bridges and buildings. The petitioner is a drayman, or carman, who, for some years, has pursued his business at Jersey City. Prior to November, 1875, he carried goods and merchandise for any one who would employ him. In that month he made a contract with the defendants to do all their carting in Jersey City, and after that he carried all the iron and lumber they sent to Jersey City by railway, to such points as they directed it to be taken. His claim is for the balance due for the four months immediately preceding the appointment of the receiver. After the date of his contract he worked for the defendants regularly, and almost constantly and exclusively. He was in their regular employ, and entirely under their control in all matters within the scope of his employment. He did not hold to them the relation of contractor, so that the measure of duty of each to the other was fixed by their mutual promises, but he was their servant. His claim, so far as it is made up of wages for his own labor or service, is unquestionably entitled to the preference given by the statute. The difficulty the case presents is as to that part of his claim which is made up of compensation for the use of his horses and drays.

It has been held that the term "laborer" cannot be construed as designating one who contracts for and furnishes the labor and services of others, or one who contracts for and furnishes one or more teams for work, whether with or without his own services, but that such person is properly described as a contractor. *Balch v. N. Y. & Oswego Midland R. R. Co.*, 46 N. Y. 521. This decision was made under a statute creating a preference in favor of laborers

Watson v. Watson Manufacturing Co.

alone; but it will be observed our act is broader. It declares that the word "laborers" shall be construed to include all persons doing labor or service of whatever character as workmen or employes. Laborer, though less comprehensive than employe, is made its equivalent, and the correlative of employer. The word "employe" properly describes any one who renders labor or service to another, and in *Gurney v. Atlantic and Great Western Railway Co.*, 58 N. Y. 358, it was held to embrace attorney and counsel.

The petitioner's horses and drays were the tools or instruments of his employment or business. A carpenter, blacksmith or other mechanic, whose work can only be done with tools, may be regularly employed by a corporation to work for it with his own tools. In such a case I think there can be no doubt that his wages, though largely earned by the use of tools, would be preferred. Corporations engaged in the manufacture of bulky articles, must necessarily, in the conduct of their business, have a large amount of carriage by vehicles done in the transfer of raw material from depots and wharves to their works, and in the removal of manufactured articles from their works to points where they may be delivered to common carriers to be carried to market. Such work or service is indispensable to the continuance of the business of such corporations; without raw material the manufactured article could not be made, and unless carried to market the article itself would be useless. The services of carriers of the description of the petitioner were quite as necessary and essential to the continued operations of the defendants as those of any class of workmen rendering labor or service to them. Certainly much more vitally essential than those of a porter, clerk or book-keeper, and yet they are generally regarded as being clearly within the provision of the statute. It has been held that one of the main purposes of this act is to prevent those persons whose labor is indispensable to the continuance of the business of a corporation, from abandoning it, and thus suspending its operations, whenever they become alarmed by fear of losing their

Heid v. Vreeland.

wages. *Lehigh Coal and Navigation Co. v. Central R. R. of N. J.*, 2 Stew. 252. A sudden and general desertion would, in many instances, result in complete ruin to all concerned. The principal design of this statute is to erect a guard against such disasters. I think it is quite obvious that the petitioner belongs to the class of persons which the legislature intended to protect by the enactment of this statute, and his claim therefore must be preferred.

The usual order will be advised, declaring that the petitioner's debt is entitled to the preference given by the statute, and that it shall be paid by the receiver when in funds, and when payment can be made without prejudice to other claims of equal or superior rank.

KATIE HEID

v.

EDO VREELAND.

1. Where the purchaser of land, encumbered by a mortgage, agrees to pay a particular sum as purchase-money, and, on the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, the purchaser is bound to pay the mortgage debt, whether he agreed to do so by express words or not.

2. A creditor is entitled to the benefit of all collateral obligations held for the payment of his debt by any person liable to him as surety.

On final hearing on bill, answer and proofs.

Mr. E. S. Atwater, for complainant.

Mr. Garret Ackerson, Jr., for defendant.

Heid v. Vreeland.

THE VICE-CHANCELLOR.

This case presents but a single question: Is the defendant personally liable for the complainant's debt? The bill is filed to enforce the payment of a mortgage for \$2,000, made by George R. Blakiston to the complainant, bearing date March 1st, 1873. The mortgaged premises were subsequently conveyed by Blakiston to the defendant, by deed bearing date December 1st, 1873. The bill alleges that this deed contains a covenant whereby the defendant became bound to pay the complainant's mortgage. The deed is in evidence, and it is the only evidence before the court touching the question in dispute. The deed makes no allusion to any mortgage except in the covenant against encumbrances. That covenant is in these words:

"And that the said land and premises are now free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature or kind soever, except mortgage of \$2,000, part of consideration money."

By the bill it appears that the mortgaged premises were conveyed by the complainant to Blakiston, and that the mortgage in suit was given in part payment of the purchase-money. The conveyance by Blakiston to the defendant purports to have been made for a consideration of \$3,500, which the deed declares has been paid, and the defendant forever released from any liability therefor.

If the defendant is bound by any contract with Blakiston, whether expressed in the deed or not, to pay the complainant's mortgage, the complainant has a right to the benefit of it, upon the principle that a creditor is entitled to the benefit of all collateral obligations held for the payment of his debt by any person liable to him as surety. The rule is now so well settled as to be regarded, in this class of cases, as familiar law.

While the counsel of the complainant admits his proofs do not show a covenant of the effect set up in his bill, he yet insists they do show that the defendant kept back a suffi-

Heid v. Vreeland.

cient sum of the purchase-money to pay the complainant's mortgage, and that by such retention he became, according to an established doctrine of this court, personally liable for her debt. There can be no doubt at this day that where the purchaser of land encumbered by a mortgage, agrees to pay a particular sum as purchase-money, and, on the execution of the contract of purchase, the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to pay the mortgage debt, whether he agreed to do so by express words or not. This obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it. His retention of the vendor's money for the payment of the mortgage, imposes upon him the duty of protecting the vendor against the mortgage debt. This must be so even according to the lowest notions of justice, for it would seem to be almost intolerably unjust to permit him to keep back the vendor's money with the understanding that he would pay the vendor's debt, and still be free from all liability for a failure to apply the money according to his promise. *Stevenson v. Black, Sax.* 338; *Tichenor v. Dodd*, 3 Gr. Ch. 454; *Crowell v. Hospital of Saint Barnabas*, 12 C. E. Gr. 650; *Thayer* ads. *Torrey*, 8 Vr. 339; *Townsend v. Ward*, 27 Conn. 610; *Jones on Mort.* § 749.

A different view was expressed in *Belmont v. Coman*, 22 N. Y. 438. It was there held that where lands are conveyed subject to a mortgage, and the amount of the mortgage is deducted from the purchase-money agreed upon, no personal liability is thereby created against the purchaser, but that the true exposition of the intent of the parties under such an arrangement is, that so much of the purchase-money as is represented by the mortgage is not to be paid by the purchaser to anybody, but shall be paid out of the land, and in that manner only. Such interpretation would undoubtedly

Heid v. Vreeland.

carry into effect the intention of the parties where the interest sold is merely the equity of redemption, and the purchase-money agreed upon represents simply the value of the mortgagor's interest in the mortgaged premises over the mortgage debt; but where the purchase-money agreed upon represents the whole value of the premises free from the mortgage, and one of the mortgagor's objects in selling is to relieve himself from the mortgage debt, the vendor would seem, according to the plain meaning of the arrangement, to have a clear right to the whole sum agreed to be paid, or, if part is kept back to pay the mortgage, that the purchaser shall be required either so to apply it, or to indemnify the mortgagor against the mortgage debt; such I understand to be the principle established by the adjudications of this state, and in my view there can be no doubt it is founded on justice and reason.

But it is obvious, at a glance, that the proofs here entirely fail to show the retention of a single penny of the purchase-money. It is not even pretended by the bill that any part of it was kept back. The deed admits the payment of the whole of it—and the deed is the complainant's only evidence—and, so long as that admission stands uncontradicted and unexplained, it is conclusive. The inference which may be drawn from the words "part of the consideration money," is quite too feeble to overcome the force of this admission; besides, those words may, without the least perversion, be understood as referring to the fact recited in the bill, that the mortgage was given to secure part of the purchase-money due to the complainant on the original sale.

In my judgment, the evidence fails to show that the defendant is liable either upon an express or implied contract for the complainant's debt, and a decree for deficiency against him must therefore be denied.

Burnet v. Burnet.

THE EXECUTORS OF ELIZA A. BURNET, deceased,

v.

SAMUEL N. BURNET.

1. In construing a will, all doubts must be resolved in favor of the testator's having said exactly what he means.

2. A gift to the children of A: and B. (they being persons who could not have offspring jointly) must be construed according to the plain grammatical sense of the words used, and constitutes a gift to B. himself and to the children of A.

3. In construing a will, extrinsic evidence of the circumstances, situation and surroundings of the testator, and of his property, is admissible for the purpose of enabling the court to understand the meaning and application of the words he has used, but not for the purpose of showing an intention inconsistent with the words of the will.

4. Extrinsic evidence is also admissible in cases of latent ambiguity, where there are two or more persons or things exactly answering the person or thing described in the will. In such a case parol evidence may be received of what the testator said, to show which of them he meant, but not to show that he meant a person or thing different from the one mentioned in the will.

5. Under a bequest or devise to a certain person, and to the children of a certain other person, the donees take *per capita* and not *per stirpes*.

6. Unless a contrary intention is manifested, all lapsed, void and illegal legacies fall into the residuum and pass as part of it, but this rule does not apply to the residue. If a gift of the residue, or any part of it fails, whether by lapse, illegality or revocation, to the extent that it fails the will is inoperative, and the subject of the gift passes to the next of kin.

On final hearing, on bill, answers and proofs.

NOTE.—Besides the authorities referred to by the vice-chancellor, and those in *Hawk. on Wills* 113, notes; *Wms. on Ex'rs.* 1514, notes; 1 *Roper on Leg.* 159, the following, mostly recent cases, exemplify the rule that such donees take *per capita*:

Thornton v. Roberts, 3 *Stew.* 473; *Brittain v. Carson*, 46 *Md.* 186; *Payne v. Rosser*, 53 *Ga.* 662; *Luke v. Marshall*, 5 *Dana* 354; *Miller v. Miller*, 1 *Duv.* 8; *Clark v. Lynch*, 46 *Barb.* 68; *Seabury v. Brewer*, 53 *Barb.* 662; *Myres v. Myres*, 23 *How. Pr.* 410, 53 *Barb.* 664; *Imler's Appeal*, 2 *Grant's*

 Burnet v. Burnet.

Mr. Alfred Mills, for complainant.

Mr. H. C. Pitney, for the children of Joseph H. Burnet.

Mr. Augustus W. Bell, for the children of Benjamin F. Howell.

Mr. George T. Werts, for the next of kin.

THE VICE-CHANCELLOR.

The bill in this case seeks a construction of the residuary clause of the will of Eliza Ann Burnet, deceased. That clause reads as follows :

"If anything should remain after paying legacies and expenses of settling my estate, I authorize my executor to divide it between the children of Joseph H. Burnet and Benjamin F. Howell."

Benjamin F. Howell attested the execution of the will as one of the subscribing witnesses, consequently, if he is one of the legatees designated, the gift to him is void by statute (*Rev. p. 1244*). He has two children, both born prior to the making of the will, who claim that they are the legatees designated, and that the testatrix intended that this clause of her will should be read as follows :

"I authorize my executor to divide the residue between the children of Joseph H. Burnet and of Benjamin F. Howell."

Cas. 322 ; *Hill v. Bowers*, 120 *Mass.* 135 ; *Stowe v. Ward*, 3 *Hawks* 604, 2 *Dev. Eq.* 509 ; *Whitehurst v. Pritchard*, 1 *Murph.* 383 ; *Bryant v. Scott*, 1 *Dev. & Bat. Eq.* 155 ; *Harrell v. Davenport*, 5 *Jones Eq.* 4 ; *Britton v. Miller*, 63 *N. C.* 268 ; *Rogers v. Rogers*, 2 *Heal* 660 ; *Conner v. Johnson*, 2 *Hill Ch.* 41 ; *Perdriau v. Wells*, 5 *Rich. Eq.* 20 ; *Sharp v. Sharp*, 35 *Ala.* 574, 579 ; *Crawford v. Redus*, 54 *Miss.* 700 ; *Williams v. Yates*, 1 *C. P. Coop.* 177 ; *Payne v. Webb*, *L. R.* (19 *Eq.*) 26 ; *Stevenson v. Lesley*, 9 *Hun* 637, 70 *N. Y.* 512.

See, however, *Hamlett v. Hamlett*, 12 *Leigh* 350 ; *Hoxton v. Griffith*, 18 *Gratt.* 574 ; *Sheay v. Winston*, 7 *Humph.* 472 ; *Jourdan v. Green*, 1 *Dev. Eq.* 270 ; *Spivey v. Spivey*, 2 *Ired. Eq.* 100 ; *Haskell v. Sargent*, 113 *Mass.* 341 ; *Barnaby v. Tassell*, *L. R.* (11 *Eq. Cas.*) 363 ; *Billinslea v. Abercrombie*, 2 *Stew. & Port.* 24 ; *Paul v. Bull*, 31 *Tex.* 10 ; *Nettleton v. Stephenson*, 13 *Jur.*

Burnet v. Burnet.

If we read the will according to its plain grammatical sense, there can be no doubt as to its meaning. Benjamin F. Howell is the legatee; he cannot be removed and his children substituted without an interpolation which will work a revocation of the will as it now stands, and make a new will as to one of the legatees. All doubts must be resolved in favor of the testator's having said exactly what he meant, and plain, clear words, read in their ordinary sense, must always control in searching for the intention of a testator, unless repugnant to other words used in another part of the will. *Courter v. Stagg*, 12 C. E. Gr. 305; *Graydon's ex'rs v. Graydon*, 10 C. E. Gr. 561; *Hand v. Marcy*, 1 Stew. 59; 1 Redf. on Wills 421 § 35. In the absence of something in the context in the circumstances of the case to exclude the natural import of the words of a will, the court is bound to give them effect according to their plain grammatical sense.

In *Lugar v. Harman*, 1 Cox 249, the testator gave the residue of his personal estate to one Harman for life, and after Harman's death directed that it be equally divided amongst "all and every child and children of my late cousin Edward Lugar, and my cousin Philip Fearis, and their representatives." Sir Lloyd Kenyon, M. R., in disposing of a claim set up by the children of Fearis, said: "To make the bequest read so as to make it a gift to the children of Fearis you must add the word "of," whereas, the words, as they

618; *Talcott v. Talcott*, 39 Conn. 186; *Allison v. Chaney*, 63 Mo. 279; *Rand v. Sanger*, 115 Mass. 124; *Roome v. Counter*, 1 Hal. 111.

How far a direction "to divide" the estate, governs the construction, see *Ackerman v. Burrows*, 3 Ves. & Beam. 54; *Abrey v. Newman*, 16 Beav. 431; *Amson v. Harris*, 19 Beav. 210; *Pruden v. Paxton*, 79 N. C. 446; or, the use of the preposition "between;" there being more than two beneficiaries, *Ward v. Tomkins*, 3 Stew. 3; *Herneisen v. Blake*, 1 Phila. 131; see *Rickabe v. Garwood*, 8 Beav. 579; *Att'y-Gen. v. Fletcher*, L. R. (13 Eq.) 128; or, a repetition of such connecting words as "to," "of," or "and," *Blackler v. Webb*, 2 P. Wms. 383; *Dowding v. Smith*, 3 Beav. 541; *Bricker v. Whalley*, 1 Vern. 233; *Warrington v. Warrington*, 2 Hare 54; *Peacock v. Stockford*, 3 DeG. M. & G. 73; *McMaster v. McMaster*, 10 Gratt. 275; *Brown v. Ramsey*, 7 Gill 347; *Farmer v. Kimball*, 46 N. H. 435; *Fissel's Appeal*, 27 Pa. St. 57; *Risk's Appeal*, 52 Pa. St. 273.—REP.

Burnet v. Burnet.

stand, have a plain, grammatical sense, viz., to the children of Edward Lugar, and to Philip Fearis himself." The correctness of this construction was questioned in *Mason v. Baker*, 2 K. & J. 567, and in the matter of *Davies's will*, 7 Jur. (N. S.) 118, Sir John Romilly, M. R., said it was contrary to the ordinary and common sense meaning of the terms, but it was adopted in *Peacock v. Stackford*, 3 DeG. M. & G. 73, and Sir John Romilly afterwards approved and followed it in *Stummvoll v. Hales*, 10 Jur. (N. S.) 716, 34 Bear. 124. In *Pitney v. Brown*, 44 Ill. 363, it would seem that both court and counsel regarded the rule of construction laid down in *Lugar v. Harman* as so unquestionably sound as to require neither discussion nor consideration. In my judgment, according to the plain meaning of the words of the gift, Benjamin F. Howell is the legatee, and not his children.

An attempt has been made, in this case, to show, by the introduction of parol evidence, upon whom the testatrix intended to cast the residue of her estate. There is no possible ground upon which an offer of such evidence can be entertained for one moment. Judge Depue has recently stated, with his usual clearness and accuracy, how far the courts may resort to extrinsic evidence in construing a will. He says: "Extrinsic evidence of the circumstances, situation and surroundings of the testator, and of his property, may be given, to enable the court to understand the meaning and application of the language he has used, but no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself. The only exception to this rule is, that the declarations of the testator may be resorted to in cases of latent ambiguity, which arise where there are two or more persons or things, each answering exactly to the person or thing described in the will. In such an event parol evidence of what the testator said, may be adduced, to show which of them he intended, but such evidence will not be allowed to show that he meant a thing (or a person) different from that disclosed in the will." *Griscom v. Evens*, 11 Vr. 402, 407.

Burnet v. Burnet.

At the date of the will, and also at the death of the testator, Joseph H. Burnet had four children. There were, therefore, five residuary legatees. Do they take *per capita* or *per stirpes*? The established rule is, that where a bequest or devise is made to a certain person, and to the children of a certain other person, the donees take *per capita* and not *per stirpes*, or as a class, each taking an equal share. *Smith v. Curtis*, 5 *Dutch*. 345; *Fisher v. Skillman*, 3 *C. E. Gr.* 229, *Pitney v. Brown*, *supra*; *Blackler v. Webb*, 2 *P. Wms.* 383; 2 *Jarman* 111, *marg.*; *Hawk. on Wills* 113. This construction will yield where it appears, even faintly, from any other part of the will, that the testator intended a different method of division should be adopted. This will affords no glimpse of such an intention, and the division must therefore be by equal shares.

The remaining question is, Who takes that portion of the residue intended to be given to Benjamin F. Howell, the gift of which is made void by the statute—does it go to the remaining residuary legatees, or to the next of kin as estate as to which the testatrix died intestate? It is an established canon of construction, that unless a contrary intention is manifested, all lapsed, void and illegal legacies fall into the residuum, and pass as part of it. *Tindall's ex'rs v. Tindall*, 9 *C. E. Gr.* 512. But this rule does not apply to a gift of the residue when a gift of the residue, or any part of it, fails, whether by lapse, illegality, or revocation; to the extent of the failure, the will is inoperative. *Garthwaite's ex'rs v. Lewis*, 10 *C. E. Gr.* 351; *Hand v. Marcy*, 1 *Stew.* 59; *Hawk. on Wills* 42; 1 *Jarman* 293, *marg.*, note 1; 2 *Redf. on Wills* 445, 8 *marg.*, note 36; *Bagwell v. Dry*, 1 *P. Wms.* 700; *Page v. Page*, 2 *P. Wms.* 489; *Humble v. Shore*, 7 *Hare* 247.

Sir William Grant, in *Leake v. Robinson*, 2 *Mer.* 362, 392, said: "I have always understood that, with regard to personal estate, everything which is ill given by the will falls into the residue; and it must be a very peculiar case indeed in which there can be at once a residuary clause and a partial intestacy, unless some part of the residue itself be ill

Burnet v. Burnet.

given." And Sir Thomas Plumer, M. R., in *Skrymsher v. Northcote*, 1 *Swans*. 566, 570, said: "It seems clear, on the authorities, that a part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of residue; but, instead of resuming the nature of residue, devolves as indisposed of. Residue means all of which no effectual disposition is made by the will other than by the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails the will is inoperative." And the same rule was applied in a case where a testator, by a codicil, revoked the gift of one share of the residue given by his will, and made no other disposition of it. As to that share, it was held he died intestate. *Cresswell v. Cheslyn*, 2 *Eden* 123. The decree in this case was affirmed by the house of lords. 3 *Bro P. C.* 243. The principle established in this case has quite recently been recognized and enforced by both the master of the rolls and the lord chancellor of England. *Sykes v. Sykes*, L. R. (4 *Eq. Cas.*) 200, (3 *Ch. Ap.*) 301.

Humphrey v. Tayleur, Amb. 136, is cited as declaring a different doctrine, but I think there is a very obvious distinction between it and the other cases. The gift in that case was held to be made to two persons jointly, and it was also held, that although it was usually necessary, where a gift was made to two jointly, that one should die to enable the other to take the whole, yet that this rule was not universal in its application, for it had been adjudged that where an estate was limited to two jointly, one of whom was incompetent to take, the other should have the whole. Lord Hardwicke's judgment went mainly on the ground that the gift was joint, and that it was also clear, from plain words, that the testator intended that his next of kin should, in no event, take any more of his estate than he had expressly given to them. If, however, that case could be regarded as a decision on the very point in question, the weight of judicial opinion standing in opposition to it is so

Dawson v. Drake.

strong that it cannot, at this day, be esteemed a safe authority.

A decree will be advised directing payment of four-fifths of the residue to the children of Joseph H. Burnet, and the remaining one-fifth to the next of kin of the testatrix.

JACOB H. DAWSON

v.

ELKANAH DRAKE and others.

1. A mortgagee who takes possession of the lands mortgaged to him, either by himself or a tenant, is chargeable with a reasonable rent.

2. He is liable, whether he receives rent or profit or not; by taking possession he assumes the position of owner, and is therefore chargeable with the profit a provident owner could have made.

3. But actual possession, or a reception of the profits, or a fraudulent use of his power as mortgagee, to the loss of a subsequent encumbrancer, must be shown to render him liable.

On motion for order directing payment of the proceeds of sale of mortgaged premises. Heard on proofs taken orally before the vice-chancellor.

Mr. Charles F. Hill, for the defendant William M. Drake.

Mr. George F. Tuttle, for complainant.

THE VICE-CHANCELLOR.

The object of this proceeding is to procure an adjudication whether or not the complainant has had possession of the mortgaged premises as mortgagee, and is therefore liable for rents and profits, and also for waste alleged to have been committed. A right to an account on both

Dawson v. Drake.

grounds is claimed by the defendant William M. Drake, as owner of the second lien. The complainant purchased the mortgaged premises at a sale made February 19th, 1878, under a decree made in this cause. That sale, on the application of William M. Drake, was set aside, and a resale ordered. A second sale was made July 2d, 1878. On the day of the first sale, and immediately after he purchased, the complainant verbally agreed with his son Jacob to convey the mortgaged premises to him as soon as he obtained title from the sheriff. At this time the mortgaged premises were vacant, the mortgagor had been adjudged a bankrupt, and the keys to the house were in the possession of his assignee. Nothing was said between the complainant and his son upon the subject of possession, but, immediately after agreeing to purchase, the son got the keys of the assignee, and took possession by his permission and advice. He at first, for a few days, had a person to sleep in the house at night to watch it, and on the 2d or 3d of March, 1878, moved in himself, and remained until about the middle of June following. The mortgagor, before leaving the house, and some time before the sale, removed two doors from the house and delivered them to the person who made them, they never having been paid for. They were in this person's possession at the time of the sale. The complainant's son, after he took possession of the house, purchased these doors of the maker, and replaced them in the house, and when he left took them out again. The complainant's son is a stranger to this suit. This summary exhibits all the facts necessary to be considered.

The questions upon which the opinion of the court is asked, are presented informally, and as incidents of the resale, and, by desire of counsel, are to be decided on their merits, regardless of form.

The legal rules to be applied in determining whether the claim made against the complainant should be allowed or not, are well settled. A mortgagee who takes possession of the lands mortgaged to him, either by himself or by a

Dawson v. Drake.

tenant, is chargeable with a reasonable rent for them (*Moore v. De Graw*, 1 *Hal. Ch.* 346; *Demarest v. Berry*, 1 *C. E. Gr.* 481); he is liable for rent whether he actually receives it or not; by taking possession he assumes the position of owner, and is therefore chargeable with the profit a provident owner could have made (*Shaeffer v. Chambers*, 2 *Hal. Ch.* 548); but actual possession, either in person or by a tenant, or a reception of the profits, or some fraudulent use of his power as mortgagee, to the loss of a subsequent encumbrancer, must be shown to render him liable. *Demarest v. Berry*, *supra*.

Applying these rules to the facts of this case, it is impossible, I think, to suggest any rational theory upon which the complainant can be held. He never had either actual or constructive possession of the mortgaged premises; he never authorized his vendee to take possession, nor, so far as appears, did he know that his vendee intended to do so. On the contrary, it is shown that his vendee took possession by permission of the owner of the equity of redemption. His authority to enter was derived from the assignee in bankruptcy, and not from the complainant. Unless his contract of purchase provided that a right to possession should precede title, the vendee would have no right to enter into possession until he got title. It is not pretended that the contract contained such a provision. The complainant is not liable for rents and profits.

The claim for damages for waste is equally groundless. If waste was committed the complainant did not commit it; nor did he put in possession the person who did commit it; nor is he, by reason of any act done or omitted, in any way responsible for the spoiler's acts.

The defendant's application must be denied.

Palys v. Erie Railway Co.

JOSEPH PALYS

v.

RECEIVER OF THE ERIE RAILWAY COMPANY.

1. A person who is injured by a collision with a railroad train, is not entitled to damages if it appears that his negligence was the proximate cause of the collision, or materially contributed in producing it.

2. Contributory negligence is such want of care as materially helps in producing the disaster.

3. A person who attempts to cross a railroad when he knows a train is due, and that he cannot make the passage in safety if the slightest delay or mishap occurs to him, is guilty of negligence, and if he is injured by a collision has no right to damages.

On petition for a remedy for damages alleged to have been sustained in consequence of the negligence of the receiver in operating the railway under his charge. Heard on proofs taken orally.

Mr. Jos. A. McCreery and *Mr. L. Ruser*, for petitioner.

Mr. R. W. Parker and *Mr. Cortlandt Parker*, for receiver.

THE VICE-CHANCELLOR.

The petitioner seeks to recover damages for the loss of an arm and the destruction of his horse and wagon. He was struck by the locomotive of a passenger train on the railway operated by the defendant, while attempting to cross the railway at Rutherford Park, on a public road known as Union avenue, on the evening of December 1st, 1877. His horse was killed, and his wagon so entirely destroyed as to be useless, and his right arm so badly crushed and broken as to render amputation necessary. The defendant denies negligence, and insists that the evidence shows that the petitioner's injuries resulted from his own carelessness.

Palys v. Erie Railway Co.

If the petitioner was careless, and his carelessness was the proximate cause of his injuries, or materially contributed in producing them, though he may have shown that the defendant's employes were also careless, and that their carelessness also contributed in producing his injuries, he has no right to damages, for, in that case, his misfortunes would, in a material degree, be the result of his own fault. *Drake v. Mount*, 4 Vr. 441; *Harper v. Erie Railway Co.*, 3 Vr. 88; *Blaker's ex'rs v. N. J. Midland Railway Co.*, 3 Stew. 240. Contributory negligence is such want of care on the part of the person injured as materially helps in producing his injury.

On behalf of the defendant, it is insisted that the proofs show that the petitioner either heedlessly drove directly in front of the locomotive, or that he went upon the railway when he knew a train was due at the point where he attempted to cross, and that it would be impossible for him to make the passage in safety if the slightest delay or mishap occurred. The evidence produced by the petitioner designed to show the position of the train with reference to the crossing at the time he attempted to cross, is very contradictory. If the testimony of the boy, who was with him in the wagon at the time the collision occurred, is believed, there can be no doubt he drove upon the railway in the very blaze of the headlight of the locomotive. There seems to be no dispute that his horse stopped immediately after crossing the track on which the colliding train was running, leaving his wagon standing across the track. The boy says: "When the horse stopped, I went to jump off, but I got no chance, because the train hit us. I had no chance to get off before the train hit us, it came so quick." He also says: "The engine came as soon as the horse stopped. I did not have time to jump from the wagon between the time the horse stopped and when the engine struck us, it was so short." If this is a correct statement of the facts, it can scarcely be disputed that the petitioner drove upon the track with his eyes and ears shut, or, if he had them open,

Palys v. Erie Railway Co.

he was fully conscious of the extreme peril of his experiment, but rashly determined to risk it. In either case, he must be regarded as the author of his misfortunes.

But the decided weight of the evidence is against the correctness of this view. A clear preponderance of the evidence shows that the petitioner drove upon the track before the train rounded the curve, and before the headlight could be seen from the point where he was. The petitioner himself swears that before driving upon the track, and also after he got upon it, he looked and listened, but neither saw nor heard anything which gave notice of the approach of a train. In consequence of the darkness of the night, the rays of the headlight must have been very conspicuous, and if the locomotive had then turned the curve, and the petitioner had looked in that direction, he could not have failed to see the light. His witness, Henry Gaede, who was standing near the depot, and over two hundred feet further south from the curve, says: "I saw the headlight as it came around the curve; when I first saw it I looked at the top of the smoke-stack and then down, and saw a wagon on the track; I think the wagon was on the track when the train came round the curve; I did not take much notice of it, for I thought it had ample time to get across." And William Dooley, the locomotive engineer, says: "I observed a horse and wagon on the track when we were about eight hundred feet from them, as near as I could judge; I supposed they were crossing, but on closer observation I saw they did not move, and then I gave the signal to apply brakes, reversed my engine, and blew three or four sharp whistles." If Gaede's evidence is believed, it is certain the petitioner drove upon the track either before or just as the locomotive rounded the curve, and if the petitioner's own testimony is fully credited, it is clear he went there before the headlight could be seen, and, of course, before the locomotive had rounded the curve. The petitioner had just returned from New York, on a train reaching the depot at Rutherford Park at fifty-seven minutes after five, and he says he knew

Palys v. Erie Railway Co.

the next train going south was due at that station at two minutes after six, leaving an interval of only five minutes between the arrival of the train on which he was a passenger, and the arrival of another going in the opposite direction. On leaving the depot he walked a distance of over three hundred feet in search of his wagon, stopping only a few seconds to talk to an acquaintance. He found his horse and wagon at the corner of Erie and Union avenues, a few feet west of the crossing; he says he put his bundles into the wagon, and then entered himself, and "sat some," waiting and listening for the train, but heard nothing; he then turned his horse and wagon about and drove upon the track; meanwhile, he says, he looked and listened, but saw nothing, and heard nothing indicating the approach of a train. The time thus consumed was nearly or fully equal to the interval between the two trains; when, therefore, he drove upon the track, he knew a train was due, and would pass in a very short time. Reasonable caution, in view of the danger of the place and the darkness, required him to wait until the train had passed, or, if he went on in advance of it, to make use of such safeguards as would be certain to ensure his safety. In attempting to cross at the time he did, he rashly placed himself in a position of imminent peril, and was, therefore, bound to use extraordinary caution and vigilance to guard against disaster, or bear the consequences of his temerity. When it is shown that the person seeking compensation for injuries resulting from a collision with a railway train, was accustomed to pass the crossing where the collision occurred, and knew the time when the colliding train would pass, and the rate of speed at which it usually passed, he will be held bound to exercise such caution and care as are necessary to avoid a collision, provided the train passed on time and at the usual rate of speed. *Continental Improvement Co. v. Stead*, 5 Otto 161.

The railway at the place where the collision occurred, consists of three tracks—the west track is used by trains going south, the next by trains going north, and the third

Palys v. Erie Railway Co.

for switching. The colliding train was on the west track, moving south. The petitioner, in attempting to cross, moved eastward. He says his horse walked forward steadily until he crossed the west track, and was there stopped by a freight car standing on the switch, directly across Union avenue. He says the car stood right in front of his horse when he stopped. When the horse stopped, he says he first made an effort to drive around the car, but the horse refused to go; he then applied the whip, but the horse still refused to move, and he then tried to pull him back, and while so engaged the locomotive struck him. That part of Union avenue which is laid on the road-bed of the railway, and is actually used by vehicles for travel, is planked, plank being laid both between the tracks and at their sides, but the planking does not extend across the whole width of the road, as laid out. There is some evidence tending to show that the freight car, on the night in question, stood so far in the roadway as to project over the northerly portion of the planking ten or twelve feet, but this evidence is entitled to very little weight when contrasted with that of the person who had the car put in position to be unloaded, and afterwards had it removed. and of another who was about it all day, unloading it, and who was in it at the time of the collision. They say that it stood in the roadway a few feet, but did not project over the planking, nor at all impede or obstruct travel over that part of the roadway used by vehicles. This, I am convinced, was the fact. And I am also satisfied that the car was not in position to obstruct the petitioner's passage, unless he was attempting to make a passage aside from the usual line of travel.

But it is quite obvious, I think, if the petitioner has correctly described the conduct of his horse, that he negligently suffered himself to be detained upon the railway for an unnecessary period of time. According to his narrative of the occurrence, when the horse was driven in front of the car he stopped, but gave no evidence of fear or fright; he showed no desire to escape by rushing to the one side or the

Palys v. Erie Railway Co.

other, or by falling back; he simply stopped and sullenly refused to move; when the bit was applied to change his course he refused to obey it, and when an attempt was made to urge him forward by the use of the whip, he still refused to move. This was the conduct of a balky horse. As already remarked, the petitioner knew, when he went upon the track, that the train which injured him was then due, or nearly so, and that the slightest delay or mishap in crossing would put him in extreme peril. He made a hazardous experiment and failed. If he had seen the train coming, but, notwithstanding, had rashly attempted to cross in advance of it, and had failed and been injured, his injuries would have been esteemed the result of his own fault.

Railroad Co. v. Houston, 5 Otto 697. The present situation, in point of principle, is very little better, for though he says he looked and listened for the train, and did not see or hear it, yet he knew it was due or almost due, and that if he attempted to cross in advance of it the passage must be made quickly, and without delay or accident, or he would be in danger of being run down. Besides, it is important to observe that it appears he had sufficient time to escape, after he had an opportunity to receive full warning of his peril, but neglected to use it. The distance from the point where he stood to the point where the headlight was first visible, after the locomotive rounded the curve, was over three thousand feet. The whistle was blown as the train rounded the curve, and the headlight was thrust into full view the moment it turned the curve. As the train rounded the curve it was moving at a speed of twenty miles an hour, and when within about eight hundred feet of the petitioner the brakes were applied and the engine reversed. But if we say it continued at the same speed until the collision occurred, a period of over one minute and forty seconds elapsed between the time the headlight first came in sight and the collision. The instant his horse stopped, it was the duty of the petitioner to look towards the point of danger; a reasonable regard for his own safety demanded that he

Lee v. Stiger.

should do so, and there can be no doubt, I think, that had he even cast a glance towards the point of peril when he found his horse refused to move, he could have averted the disaster, or at least made a safe escape himself. In my judgment, the fact that the petitioner went upon the railway when he knew that a train was due or almost due, at the point where he attempted to cross, and that he remained there, almost in the very blaze of the headlight, for a period sufficient to have enabled him to make good his escape, presents a case of such strong, contributory negligence as cuts him off from all right to compensation for his injuries.

His petition must be dismissed.

FRAZEE LEE and DANIEL H. LEE

v.

ELIZABETH W. STIGER.

1. A material and controlling fact averred in the bill, and not denied or alluded to in the answer, must be taken as admitted.

2. A purchaser of an equity of redemption in lands covered by a usurious mortgage, who purchases subject to the lien of the mortgage, will not be allowed to set up usury against such mortgage.

3. The same rule applies to a purchaser at a judicial sale, when it appears that he purchased with an understanding that he should take the property subject to a prior usurious mortgage.

On final hearing on bill, answers and proofs.

Mr. J. Henry Stone, for complainants.

Mr. John H. Jackson, for defendant.

THE VICE-CHANCELLOR.

The case presents a single question: Can the defendant be heard in support of the defence she seeks to make? Her

Lee v. Stiger.

defence is usury. The bill alleges that the mortgaged premises were conveyed to her on the 2d day of October, 1875, by deed, in which it was stipulated that she should accept them subject to the encumbrances thereon. They were then subject to the mortgage in suit. She is not the mortgagor, nor does she defend in virtue of his rights, but simply as guarantor of the debt secured by his mortgage. The answer neither admits nor denies the averment of the bill that the mortgaged premises were conveyed to her subject to the lien of the mortgage; nor does it contain any allusion to that fact. The bill on this point is unanswered and undisputed. A material and controlling fact, which is clearly and fully averred in the bill, and not denied or alluded to in the answer, must be taken as confessed. *Sanborn v. Adair*, 2 Stew. 338. As the pleadings now stand, it must be taken as an admitted fact that both the mortgagor and the defendant have recognized the mortgage in question as a valid lien.

The principle is firmly established that the purchaser of a mere equity of redemption in lands covered by a usurious mortgage, who purchases subject to the lien of the mortgage, will not be allowed to subsequently attack the validity of the mortgage on the ground of usury. *Brolasky v. Miller*, 1 Stock. 807; *Dolman v. Cook*, 1 McCart. 56; *Conover v. Hobart*, 9 C. E. Gr. 120. And it has been held by the court of errors and appeals that this rule applies to a purchaser who purchases at a judicial sale with an understanding that he shall take the property subject to a prior usurious mortgage, and thereby obtains it for a sum less than he would have been obliged to pay if such mortgage had not been treated as a legal lien. *Warwick v. Dawes*, 11 C. E. Gr. 548.

The reason of the rule is obvious. The statute against usury is designed to give protection to the borrower against the greed of the lender, and not to afford any mere adventurer who may happen to slip into the seat of the borrower, a right to speculate on a violation of law which has done him no harm, and caused him no loss. When the borrower

Rowley v. Flannelly.

sells his interest in the land he has pledged for the payment of a usurious debt, subject to that debt, he recognizes the validity of the debt, and waives the benefit of the statute. After the party aggrieved has forgiven an injury, it would not be consonant with either justice or reason to allow a stranger to set it up for his own personal advantage. The defendant has no right to display the wrongs of another as a means of relieving her property from a burden it was understood it should bear at the time she acquired it.

No judgment against the defendant personally is asked, and her defence must therefore be overruled as one she is not entitled to make.

REUBEN ROWLEY

v.

MICHAEL FLANNELLY.

1. As a general rule, the acceptance of a deed discharges the vendor from his covenant to convey, though the deed may not, in essential particulars, conform to the executory contract.

2. But this rule will not be applied to a case where the vendee accepts a deed, conveying less than he is entitled to, under a mistake or through the fraud of the vendor.

3. Equity will reform written instruments for the correction of mistakes, but to warrant the exercise of this power, the court requires clear and convincing proof.

4. In cases of mutual mistake the court will not reform, but rescind.

On final hearing, on bill and answer, and proofs taken orally before the vice-chancellor.

Mr. E. A. S. Man and *Mr. B. Williamson*, for complainant.

Mr. R. W. Parker and *Mr. C. Parker*, for defendant.

Rowley v. Flannelly.

THE VICE-CHANCELLOR.

The object of this suit is to reform a deed made by the defendant to the complainant. The deed bears date August 2d, 1870, and the bill was filed February 17th, 1874. The defendant, on the 29th day of June, 1870, made a public sale of building lots at Tenaflly, N. J. Some time prior to the sale, and for the purposes of the sale, the defendant caused his lands at Tenaflly to be surveyed and laid out into streets and building lots, and lithographic maps to be made, showing the locations and dimensions of the lots to be offered for sale. These maps, with the auctioneer's advertisement of the sale attached, were freely distributed, both prior to the sale and on the day of sale. The complainant purchased the first lot sold, and, as delineated on these maps, it extended from Hudson avenue on the south, to Union avenue on the north. He claims to have purchased, believing the lot was sold as it was described upon the maps, and also relying upon an alleged public declaration made by the auctioneer, at the time he offered the lot, that it extended from Hudson avenue to Union avenue. His deed conveys the lot to the centre line of a brook running across its rear. The rear or northern line, as fixed by the deed, is sixty-six feet south of Union avenue at the intersection of the north and west lines of the lot, and sixteen feet south thereof at the intersection of the north and east lines. The strip lying between the centre line of the brook and Union avenue is the subject matter in dispute. The complainant insists that his deed should be so reformed as to include this strip.

There can be no doubt that, if the complainant has shown by sufficient proof that his deed does not embrace all the land comprehended within his contract, and that he accepted his deed in ignorance of his rights, or under a mistake as to its contents, that he may have relief in equity. It is true, as a general rule, that the acceptance of a deed discharges the vendor from the covenant or promise to convey, though the deed may not, in essential particulars, conform to the executory contract. An executory contract, until finally per-

Rowley v. Flannelly.

formed, is subject to such alterations and modifications as the parties may agree upon, but when it is finally consummated, and a deed, made in pursuance of it, is accepted, it is presumed, as a matter of law, that the deed gives full expression to the final purposes of the parties, in respect to that part of the contract which it purports to execute. *Long v. Carpenter's adm'r*, 5 Vr. 116. But this doctrine has no application to a case where the deed conveys only a part of the land agreed to be conveyed, and the vendee does not intend to relinquish any part of his purchase, but, through mistake, or the fraud of the vendor, accepts a conveyance of less land than he is entitled to by his contract. *Conover v. Wardell*, 5 C. E. Gr. 266, 271.

The power of the court to give relief of the nature sought in this case is undoubted. It stands among the most ancient of its powers, but to warrant its exercise the proof must be very clear and convincing. When the evidence, in demonstration of mistake, is doubtful or equivocal, or strongly contradicted, so that it is impossible for the mind to reach a strong conviction as to the truth, the court will not change what is written. *Story's Eq. Jur.* 152, 157; *Graham v. Berryman*, 4 C. E. Gr. 29, 35; *Zane v. Cawley*, 6 C. E. Gr. 130; *Loss v. Obry*, 7 C. E. Gr. 52, 54; *Burgin v. Giberson*, 11 C. E. Gr. 72. Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction.

Do the proofs show, with sufficient force to entitle the complainant to a decree, that he accepted the deed in question under a mistake as to its contents, or under a misapprehension as to the location of the rear line of his lot as fixed by the deed? He purchased by oral contract; at least no written contract has been shown. The lithographic maps did not show the brook, and the complainant, in his bill, says that, until after he had accepted his deed, he had no knowledge whatever that a brook ran through the lot. He swears that, when the lot was offered for sale, the auctioneer

Rowley v. Flannelly.

stated that it extended from Hudson avenue to Union avenue, and two of his witnesses also testify that they heard the auctioneer say, on the same occasion, that the lot had two fronts, one on Hudson avenue and the other on Union avenue, and a third swears that, as he now recollects, he heard nothing said about a brook, and that he understood the lot was sold according to the map. Four witnesses on the part of the defendant all swear, with more or less certainty, that the auctioneer publicly announced, when the lot was first offered, that it would be sold to the brook, and not to the road. The defendant declares, with great positiveness, that he directed that this announcement should be made, and that he heard the auctioneer make it in such manner that everybody must have heard it. Unless some satisfactory reason has been shown why this evidence should be rejected as false, it clearly establishes the fact that such an announcement was made. Nothing has been shown which will justify its rejection. Possibly the complainant did not hear the announcement; if so, and he bid in ignorance of it, relying upon the map, then a case of mutual mistake would be shown, such as would justify a rescission of the contract. No one shall be forced to give that price for a part only which he intended to give for the whole; nor shall the other be obliged to sell the whole for what he intended to be the price of part only. *Calverley v. Williams*, 1 Ves. 210; *Stapylton v. Scott*, 13 Ves. 425; *Fry's Spec. Perf.* 308. A case appropriate to such relief is not, however, made by the bill.

But the whole of the evidence bearing on this question has not yet been mentioned. There are circumstances in the conduct of the complainant which render it almost impossible to believe that he understood, at the time of the contract, that he was purchasing a lot bounded by Union avenue. When his deed was first presented to him, it described the rear boundary of his lot as the southerly line of a brook. After giving the deed a careful examination, he asked to have this line changed to the middle of the

Rowley v. Flannelly.

brook, and also that certain covenants, intended to restrain his complete dominion over the lot, should be erased. Until he read the deed, he says, he did not know there was a stream on the lot. He is a lawyer, whose professional career, at the time this transaction occurred, had covered a period of nearly half a century. He is to be presumed to have been fully aware of the controlling force which the law gives to fixed monuments in the description of lands. The line was changed in conformity to his request, and the objectionable covenants expunged. The complainant says the defendant readily consented to the change, while the defendant, on the contrary, says, that at first he refused to allow any change to be made, stating that he had only sold the lot to the stream, and that he would not convey any part of the stream; that thereupon the complainant proceeded to argue with him, saying they were old friends, that the water would be valuable to him, and would make no difference to the defendant. The defendant says he at last consented, on condition that the complainant would pay for a new deed. This statement is corroborated in its most material point. The only person present at this interview who has been examined as a witness, says that he remembers there was a discussion between the parties as to one of the boundaries, and that after they came to an agreement upon the subject, he altered the deed to make it conform to their understanding. It is undeniable, upon the complainant's own showing, that he accepted his deed fully understanding that it fixed the middle of the brook as the rear line of his lot. It is also undeniable that the location of that boundary was the subject of discussion and arrangement at the time of the delivery of the deed. In the face of these facts, no rational contention can be made that the complainant accepted his deed under a mistake as to the location of that boundary. He dealt with the matter as one perfectly familiar to him; he neither professed ignorance, nor sought information, nor did he so much as intimate in the remotest manner that he had purchased with the understanding that

Rowley v. Flannelly.

his lot extended to Union avenue. Was he under any misapprehension as to the location of the brook? He says he supposed it ran along Union avenue. But why? No such representation had been made, and, if he speaks truthfully, until that moment he did not know that there was a brook on the lot, and he then believed that his contract gave him a right to a conveyance through to Union avenue; yet, when his deed is presented, and this boundary becomes the subject of discussion, so that his attention is specially directed to it, he does not even intimate that he understood Union avenue to be the boundary by which the lot was sold; he asks no information respecting the location of the brook, but treats it as a thing perfectly familiar to him, and as a well-understood landmark in his contract of purchase. His conduct at this important juncture was just precisely what it would have been had he understood that his contract gave him merely a right to a conveyance to the brook. It stands as a strong confirmatory witness of the truth of the defendant's contention, that having conveyed to the complainant all the land he is entitled to under his contract of purchase, he has, therefore, no just claim to the aid of this court.

Under this view of the case, the alterations made in the original map, by direction of the defendant, were not only free from any suspicion of an evil purpose, but were necessary to prevent confusion and a correct representation of the rights of the parties.

The bill must be dismissed, with costs.

Trustees of Public Schools *v.* Taylor.

THE TRUSTEES OF PUBLIC SCHOOLS

v.

JOHN L. TAYLOR and others.

1. Moneys belonging to the state cannot be taxed by a municipal corporation, and hence the lien of mortgages given by a citizen to the trustees for the support of public schools, or to the chancellor, in his official capacity, cannot be subordinated to the lien of municipal taxes assessed on the mortgaged premises after such mortgages were given, notwithstanding the charter declares that such taxes shall be paramount to every other lien or encumbrance.

2. Provisions in a city charter, inconsistent with amendments to the constitution of the state afterwards adopted, are void.

Mr. E. L. Campbell, for exceptants.

Attorney-General Stockton, for complainants.

This cause was heard before Barker Gummere, esq., a special master, on exceptions to a master's report.

THE MASTER.

The bill in this cause was filed for the foreclosure of a mortgage upon certain lands in the city of Trenton, executed by John L. Taylor and wife, to the trustees for the support of free schools, to secure a loan of \$5,000, with interest, of the moneys belonging to the state school fund, which mortgage is dated April 23d, 1861. The bill states, also, that on April 15th, 1867, Taylor and wife executed another mortgage, on the same premises, to the chancellor of the state of New Jersey, to secure a loan of \$5,413.33, with interest, and that The Inhabitants of the City of Trenton claim some interest in the same premises, by virtue of an assessment of taxes thereon, made by said city in 1875, under the provisions of its charter, approved March 19th, 1874, and its supplements, and a sale of the premises for the payment of

Trustees of Public Schools v. Taylor.

said taxes pursuant to said charter and supplements and the ordinances of the city, and the purchase of the premises by the city. The bill states that the complainants have never had notice of the tax sale, and charges that such sale at most vested in the city only the estate of the mortgagor in the premises at the date of said assessment. The city, by its answer, sets up the assessment of taxes for the year 1875, and avers that, though the premises were struck off to the city at the sale for the payment of said taxes, yet that the sale has never been completed by the execution and delivery of the declaration of sale prescribed by the charter; that the city has therefore a lien only for the amount of taxes assessed in 1875, which lien is redeemable either by the mortgagor or mortgagees, but which lien it claims to be a prior encumbrance upon the mortgaged premises, by force of the provisions of its charter, to both of the above-mentioned mortgages; and the answer further sets up that certain taxes were assessed by the city upon the same premises, under the same charter, in the years 1876 and 1877, and claims a like priority of lien, under said assessments, over said mortgages.

The cause was referred to a master of the court, in due course, who has reported that both the mortgage of the trustees and that of the chancellor are prior encumbrances on the mortgaged lands to the said tax liens, and to this report as to priorities the city has excepted, and claims that the said assessments of taxes for the years 1875, 1876 and 1877 are each and all, by force of the charter of 1874, prior liens on the premises to both of said mortgages.

These liens, and the priorities thereof, are claimed by the city by virtue of sections 55, 58, 59, 60, 61, 66, 71, 72 and 73 of its charter (*P. L.* 1874, p. 331), and section 4 of the supplement (*P. L.* 1874, p. 527); it is clear, I think, that the legislature intended by this charter that all taxes assessed in this city to an owner of a lot in respect of such lot, should be assessed both *in personam* and *in rem*; and, so far as such assessment should be *in rem*, that it should be upon and

Trustees of Public Schools v. Taylor.

include all estates and interests on said lands, whether of the mortgagor, or of the mortgagee, before or after breach of condition, or of any other person; that the lien should be established upon such estates and interests, and that such lien should be prior and paramount to the estate or interest or lien of any person in the land assessed; and it is equally clear, as the state, county and municipal taxes of each year are all to be included in one gross assessment, and are incapable of being separated and distinguished, and, as the city's quota of state and county taxes is to be paid from its general treasury, and not from the collected proceeds of the particular assessments, that the assessments are to be regarded as municipal assessments.

This charter is a special act passed before the adoption of the amendments to the constitution; it confers upon the city invidious and special privileges and powers which are not given to the other municipalities of the state; all mortgages upon lands within the city boundaries are to be assessed there as included in the land, and no deduction on account of such mortgages is allowed, whilst elsewhere in the state a deduction is allowed, and in such case the mortgage interest is to be assessed to the mortgagee; the lien of the assessment made by the city is to be established upon the estate and interest of both the mortgagor and of a mortgagee under a mortgage given before the assessment is made, whilst elsewhere the estate and interest of such prior mortgagee are to be free from the lien of a subsequent assessment. *Morrow v. Dows*, 1 *Stew.* 459. In respect both to the subjects of assessment, and to the extent of the lien therefore, important powers and privileges not accorded to other municipalities are, by this special act, conferred upon the city of Trenton. The twelfth paragraph of the constitutional amendments was intended to abolish all such special privileges, and the effect of its adoption on September 28th, 1875, was to repeal from thenceforth the sections of the charter conferring them. *State v. Newark*, 10 *Vr.* 380; *Montgomery v. Trenton*, 11 *Vr.* 89. As the assessments for

Trustees of Public Schools v. Taylor.

the years 1876 and 1877 were made after the repeal in question, they were made under the provisions of the general laws concerning taxes, and the lien of those assessments is that given by the act of 1863 (*Rev. p. 1165*), that is, a lien upon the estate of John L. Taylor in the mortgaged premises at the dates of the assessments of those years respectively, and subsequent to the lien of the mortgages to the trustees and the chancellor, which mortgages were given before the date of either of those assessments. *Morrow v. Dows, supra.*

The assessment of 1875 remains; it was made, and the lien thereof attached, as early as the last Monday in June, 1875 (*P. L. 1874, p. 527, § 41*), by force of the charter, and before the adoption of the constitutional amendments, and is unaffected by the repeal of the sections above mentioned.

The effect of this assessment in respect to the mortgage to the trustees is first to be considered. Although this mortgage was executed to the trustees for the support of free schools, yet they were merely public agents of the state in the transaction, and the mortgage is the property of the state, dedicated by the constitution to the special trusts of education. *State v. Trenton, 11 Vr. 89.* The first inquiry must be, whether the language of the charter of 1874 was intended to subject the estate, or any interest of the state in lands in Trenton, to assessment for taxes, or to any lien therefor. General terms only are used in the charter; the lien is given "notwithstanding any devise, descent or alienation" of the land, "or any judgment, mortgage or encumbrance thereon" (§ 61 of *Charter*), and the purchaser at a tax sale is to hold the land "against the owner or owners thereof, and all persons claiming under him or them" (§ 73 of *Charter*). It is clear that in both the sections the legislature had in view *persons* only, natural and artificial, as the devisees, alienees, descendants, judgment creditors, and mortgagees, whose property might be assessed, or affected by the lien of an assessment of taxes. The power to assess state property, or to affect its interests by the lien of an

Trustees of Public Schools v. Taylor.

assessment, is too important and anomalous to be evolved by mere construction. Specific words must be required to maintain a claim of so exceptional a power; all general words and phrases in a taxing act must be held to apply only to private persons and property. *People v. Doe*, 36 Cal. 220.

In point of fact, it is impossible for the legislature to clothe a municipality with the power of *taxing* state property. Taxation is in its essence an exercise of *sovereign* power over an inferior; it is an *exaction*, payment of which, by the inferior, is compelled by the superior. *Commonwealth v. Morrison*, 2 A. K. Marsh. 524, 536. The municipality, a mere creature, cannot be vested with any compulsory powers over its creator. If the state permits any part of its property to be taken for municipal purposes, such permission is a voluntary appropriation made by the state, and not taxation by the municipality. To an appropriation of the securities of the school fund, either for general state purposes or for municipal purposes, there is a complete constitutional bar; the fund is expressly dedicated by the constitution to the support of free schools, and the legislature is prohibited by that instrument from borrowing, appropriating or using the fund for any other purpose, under any pretence whatever. *Constitution, Article 4, § 7, Subdiv. C.*

It is contended on the part of the city, indeed, that this tax is not levied on state property; that the land only is assessed, and that the mortgage, being mere personalty, and not an estate in land, is not assessed, and that the charter merely postpones the lien of the mortgage to the lien of the assessment. If it be admitted that the mortgage is mere personalty, still no legislative machinery can be construed whereby any security belonging to the school fund can be lawfully impaired. The lien of the mortgage is the constituent element of its value, and as much the property of the school fund as the mortgage itself, and the legislature has no power to waive or postpone such lien in favor of

Trustees of Public Schools v. Taylor.

another, except upon full consideration paid. The assumption, however, that the mortgage is a mere personalty, is fallacious—the condition had been broken long before the assessment, and the legal estate was vested in the mortgagees, and such estate was included in the assessment. But, whatever be the qualities of the interest in this land, the state had *some* interest in it for the use of the school fund, and such interest is placed by the constitution beyond the reach of the legislature; however the lien of the school fund mortgage may be affected by the operation of the general principles of law or equity, no lien or priority created by mere legislative authority can prevail over it. The mortgage to the trustees is a lien upon the mortgaged premises prior to the alleged tax lien of the city.

As to the mortgage made to the chancellor, it is admitted that it is not the property of the present or any former incumbent of that office, but is an investment of funds in the custody of the court of chancery of this state, which custody was acquired in the due exercise of its functions. Money in court is money in the possession of the state, acting through its judicial and ministerial officers, and such possession is acquired by the exercise of the sovereign power of the state, under the direction of its courts. The state, through its courts, lays its hands forcibly upon money or upon property, which it converts into money, and not admitting a present right of property or possession in any claimant, holds the legal title thereto in itself, for the benefit of whomsoever it may at a future day determine, through its courts, to be entitled to it, in whole or in part, according to the law of the land. If such a beneficiary be found, the state will vest its legal title in him; if none be found, the title will remain vested in the state. Pending such ascertainment, the fund is the property of the state. The particular securities in question—a bond and mortgage to the chancellor—are the usual badges of legal ownership in the state. If there be any person *in esse* or *in posse* beneficially entitled to the fund secured by them, as to such person the

Trustees of Public Schools v. Taylor.

state has assumed a voluntary trust, without regard to the assent or dissent of the *cestui que trust*, and can impose no other charge upon the fund than the actual cost of the judicial administration thereof, until the beneficiary is ascertained, and the fund paid or appropriated to his use. Until such ascertainment and appropriation, the fund is as well protected by the elemental principles of law from spoliation by taxation, or otherwise, by the legislature, as is the school fund by positive constitutional provision. After a beneficiary is judicially ascertained, *he* may be taxable to the extent of the interest in the fund, the enjoyment of which in possession is awarded him; if his right only has been ascertained and the enjoyment of it is withheld, he is not taxable. But in no case can the court or its ministerial officers be assessed in respect of such fund. If the legislature has any power to appropriate moneys in court to the use of the state, or of its municipalities, it must be by some other machinery than the assessment of taxes upon the courts. Courts, judges and their ministerial officers are not beneficiaries of these funds, and have no assessable interest therein.

If, then, the charter of the city had specifically authorized the bond and mortgage to the chancellor to be assessed, or its lien to be impaired while held by him, such authorization would have been a violation of the principles of constitutional government, and void. But there is no such specific authority, either in this charter or in any law of the state. Courts, judges and their officers are not *persons* contemplated by the tax laws. *Matter of Kellenger*, 9 Paige 62. If the legal title to the mortgage in question is in the state, through its chancellor, general words in a tax law will not affect it. *People v. Doe*, *supra*. If there are beneficiaries enjoying any interest in the fund secured by the mortgage, they must be assessed in respect thereof. The condition of this mortgage, also, had been broken before the assessment of 1875; but, as has been before said, whatever was the quality of the mortgagee's interest in the land, it was included in the assessment of the land under the provisions

Trustees of Public Schools v. Taylor.

of the charter, and such assessment was void to that extent.

The chancellor is respectfully advised that the exceptions be overruled.

THE TRUSTEES FOR THE SUPPORT OF PUBLIC SCHOOLS

v.

JOHN L. TAYLOR and others.

On foreclosure of a mortgage, given to the trustees for the support of public schools of New Jersey, on May 31st, 1875, on lands in the city of Trenton, the answer of the city set up that the assessments for taxes for that year were laid between the first Monday in May and the last Monday in June, 1875 (the period designated by the charter). There being no proof that the assessment was actually made before the mortgage was given,—*Held*, that such inference could not be drawn from the answer.

Mr. E. L. Campbell, for exceptants.

Attorney-General Stockton, for complainants.

This cause was also heard before Barker Gummere, esq., a special master.

THE MASTER.

This case differs from another similarly entitled, and in which an opinion at length has been filed, in that the only mortgage upon the premises is that held by the complainants, and that said mortgage was executed on May 31st, 1875, and during the period within which the assessment for the taxes of the year 1875, in and for the city of Trenton was authorized to be made, under the provisions of the charter of that city. The answer of the city sets up, that the assessment for that year was made between the first Mon-

Trustees of Public Schools v. Taylor.

day in May and the last Monday in June, 1875, but it is not claimed in the answer, nor is there any proof, that the assessment was made before the execution of the mortgage of the complainants. The averment of the answer as to the date of the assessment is perfectly consistent with the fact that it was made after the execution of the mortgage, and, by a well-settled rule of equity pleading, the averment is to be construed most strongly against the pleader. The answer must, therefore, be taken to admit that the mortgage was executed to the complainants before the assessment was levied. *Story's Eq. Pl.* § 452a.

This case is therefore essentially alike to that in which the opinion has been filed, and for the reasons therein stated the chancellor is respectfully advised that the exceptions to the master's report be overruled.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1879.

THEODORE RUNYON, ESQ., ORDINARY.

WILLIAM S. SQUIER, appellant,

v.

ELIZABETH A. SQUIER and others, respondents.

1. Certain shares of stock standing in the name of a testator, who, in fact, held them merely as collateral security for a note of his son, one of the executors, ordered to be transferred to the son on his paying the note.

2. Where there are two executors, and both seem to have been willing to do, and to have done, whatever was required, the commissions should be divided.

On appeal from Essex orphans court.

Mr. John Lilly, for appellant.

Mr. J. G. Trusdell, for respondents.

Squier v. Squier.

THE ORDINARY.

The proceedings present for review so much of a decree of the orphans court of Essex county as charges the appellant, as one of the executors of his father, Stevens Squier, with ten shares of the stock of the Mechanics National Bank of Newark, which, on December 13th, 1859, were transferred by the appellant to his father, and which, ever since then, have stood in the name of the latter; and so much, also, as directs that the commissions for settling the estate be equally divided between the appellant and his co-executor. The appellant alleges that the stock in question was transferred by him to his father, merely as security for the payment by him, to his father, of the money which he might collect upon a note for \$500 belonging to the latter, and which, to accommodate him, he took into his hands for collection. He also claims that he has alone done the work of settling the estate, and that he, therefore, ought to receive all the commissions.

The inventory contains an item of \$3,500, money due from the appellant to the testator, and does not include the ten shares of stock. Of the \$3,500, \$500 are for the amount of the note. There appears to be no room for doubt that the testator obtained the stock from the appellant in the way stated by the latter, and merely as security for the amount of the note. The proof is clear. In addition to the other evidence is the following instrument of writing, which was found among the testator's papers:

NEWARK, N. J., June 30, '71.

Due Stevens Squier, borrowed from him, three thousand dollars, interest paid up to July 1, 1871.

Also, ten shares Mechanics' National Bank stock, to be transferred to Wm. S. Squier, by his paying for the same five hundred dollars loaned on it, now standing in my name.

WM. S. SQUIER.

Though not signed by the testator, it is, under the circumstances, evidence of the facts contained in it, and therefore

Sutton v. Morgan.

is evidence that he held the stock merely as security for the amount of the note.

It is insisted by the respondents that a statement of settlement between the appellant and his father, contained in a small book which belonged to the latter, is evidence against the former in this matter. But while the statement contains an acknowledgment of a loan of \$500 by the testator to the appellant, it, at the same time, shows that it had been repaid. It has no reference to the note. It appears on another page of the book, by an entry in the handwriting of the testator, that the \$500 mentioned in the statement of settlement, were lent in the year 1870. The note was transferred to the appellant in 1859. The paper above mentioned was manifestly given and received as evidence not only of the loan of \$3,000, but of the terms on which the stock was held.

The decree in respect to the stock must be reversed.

The settlement of the estate appears not to have required much attention, or to have been attended with much trouble. Both executors seem to have been willing to do whatever was required of them therein, and both rendered service as there was need of it. The decree is right in dividing the commissions equally between them.

The costs of the appeal, and a counsel fee of \$50 to the counsel of each party, will be paid out of the estate.

ELIZA ANN SUTTON and others, appellants,

v.

ALPHEUS MORGAN, executor, &c., respondents.

1. The evidence of three out of four disinterested, subscribing witnesses to a will (the fourth being dead at the time of the trial), as to the testamentary capacity of a testator ninety-three years old,—*Held* to outweigh that of ten other witnesses, all of whom were related to

Sutton v. Morgan.

the testator, either by blood or affinity; the fact also appearing that the testator's attending physician, although subpœnaed by the caveators and present at the trial, was not examined.

2. An application by a caveator under *Rev., Orphans Court*, p. 756, § 19, which provides that the orphans court may, on the application of a caveator or executor, certify the questions raised by any *caveat* into the circuit court of the county, for trial before a jury, was not made until after all the testamentary witnesses had been examined on the part of the proponents.—*Held*, that it was too late.

Appeal from decree of Hunterdon orphans court.

Mr. W. D. Allen and *Mr. J. T. Bird*, for appellants.

Mr. J. N. Voorhees, for respondent.

THE ORDINARY.

This appeal presents for review the decree of the orphans court of Hunterdon county, admitting to probate a paper purporting to be the last will and testament of David Morgan, deceased, late of that county. The testator was a man of very advanced age when he made the will. He was about ninety-three years old. The caveators, who are two of his daughters, allege that he had not testamentary capacity; that, if he was possessed of such capacity, the will was the result of undue influence on the part of his son Alpheus, the executor, and the wife of the latter. Alpheus and his wife lived on his farm with him, and he was under their care. The caveators also insist that the orphans court erred in denying, as they did, their request, made during the trial, to certify into the circuit court, under the nineteenth section of the orphans court act, the questions involved in the controversy. .

Though the testator was very old and infirm when he made the will, the evidence shows, beyond all question, that he was possessed of full testamentary capacity. He not only knew well who the persons were whom he desired to benefit

Sutton v. Morgan.

by his disposition of his property, but he knew and weighed well their respective claims. He gave his reasons for making his will, and gave the instructions for drawing it; and it is shown that it was drawn strictly in accordance with them. The will itself, therefore, is plenary evidence of his capacity. The disposition of his property which it contains, was made in the presence of some of his neighbors, who were selected for witnesses to his will; and it was made without aid or prompting from any one, in any respect. At his suggestion, all four of those persons signed their names as witnesses to the will. When it was stated that only two witnesses were necessary to answer the requirements of the law, he requested that they would all sign, nevertheless, in order, as he said, "to make it stronger;" and he thereupon humorously related an anecdote, precisely in point. The four witnesses were all men of business; they had known him for a long time, and they were unanimously of opinion that he was fully competent to make a will. The three of them who were sworn as witnesses on the trial (the other was dead when the trial took place), give most unequivocal and convincing testimony to his fitness to make a testamentary disposition of his property. Of these witnesses, one had known him for at least twenty-five years, another for nearly forty, and the other for about thirty. Two of them witnessed the execution of a codicil to the will, and from their testimony he appears to have shown the same capacity then.

It is not necessary, nor would it be profitable, to refer to their testimony in detail. The testimony in opposition is mainly that of Lavinia Blue, Mary Kise and Eliza Ann Sutton (two of whom are the caveators, and all of them legatees under the will); Solomon Kise, husband of Mary Kise; John Sutton, the husband of Eliza Ann Sutton; William B. Sutton, Jr., the son, and Catharine Sutton and Mary Ann Keyser, daughters of the two last-named persons, and Isaac M. Keyser, husband of Mary Ann Keyser. They testify, indeed, that the testator, at the time of making the will,

Sutton v. Morgan.

was incapable of recognizing his own children and grandchildren, and in a state of imbecility, but it is not only to be remarked that the three survivors of the four persons who were called to witness his will (some of whom witnessed the codicil to it, which was made more than nine months afterward), bear clear and unqualified testimony to the contrary, but it is noteworthy, and a most significant circumstance, that the testator's physician, who was in attendance at the trial, brought there as a witness on behalf of the caveators, was not called.

If the testator was in a condition of imbecility when the will and codicil were made, his attending physician would have been able to give important testimony on that subject. And further, there appears in the testimony of all the witnesses called by the caveators, facts in reference to the testator's conduct and conversation, which are not only inconsistent with, but are fatal to, the proposition that he was, when he made either the will or codicil, in a condition of imbecility. And it may be added, that the testimony of the witnesses on the part of the caveators is by no means of such weight as to countervail that of the three witnesses to the will, who were sworn, who have no interest in the disposition of the testator's estate, are unconnected with his family, are apparently free from prejudice or bias, and had abundant opportunity to form a judgment as to his mental condition.

Nor is there any evidence of undue influence on the part of Alpheus or his wife. Indeed, there is no evidence of influence at all. It is charged that they poisoned his mind against Solomon Kise, his son-in-law, by false statements in regard to an occurrence between Kise and Alpheus, in which, as the testator said, the former undertook to meddle in the testator's business, an occurrence of which he spoke to those who were called to witness his will. There can be no doubt that that occurrence did take place. The testator told his daughter, Lavinia Blue, about a week after the will was made, that he himself saw it. As to Alpheus, there is

Sutton v. Morgan.

not only no proof of influence, but he appears to have been slow even to ask a small business favor of his father, preferring that his wife should do it in his behalf. As to her, the facts relied upon are of no weight. The theory of the caveators is that the testator was an imbecile, and, being such, was under the control of Alpheus and his wife, or of the latter. But the proof is clear that he was of sound and disposing mind, and there is no evidence whatever that his disposition of his property by his will was not, in all respects, his free and voluntary act. As was said in *The matter of the will of Gideon Humphrey*, 11 C. E. Gr. 513, 521, whether, in any given case, there was undue influence, must be determined from the facts; it is not a presumption, but a conclusion.

The counsel of the caveators urge that the orphans court, under the section of the act above mentioned, are bound to certify the questions involved in the controversy into the circuit court, on the application of either the caveators or executors, whenever requested so to do, whether before the trial has been commenced in the orphans court, or at any time during the trial. It appears, in this case, that it was not until after the testamentary witnesses had all been examined that the caveators applied to the court to certify the questions involved into the circuit court. The application was made too late, and the orphans court therefore properly refused to certify. It should have been made before the trial was begun.

The decree of the orphans court will be affirmed, with costs, to be paid by the caveators.

Errickson v. Fields.

PARMELIA ERRICKSON, appellant,

v.

GEORGE FIELDS, administrator &c. of Susan Fields,
deceased, respondent.

1. The fact that a testatrix declared an instrument to be her last will, before she signed her name thereto, is a compliance with the statute which requires that a will be declared to be the last will of the person making it, in the presence of the witnesses.

2. The evidence in this case,—*Held*, to establish the testatrix's testamentary capacity, notwithstanding proof that she talked to herself, and seldom managed her own business matters.

Appeal from the decree of the orphans court of Monmouth county, refusing to admit the will of Hannah Errickson, deceased, late of that county, to probate.

Mr. R. Allen, Jr., and *Mr. Wm. Silas Whitehead*, for appellant.

Messrs. Beekman and Murphy, for respondent.

THE ORDINARY.

The testatrix, Hannah Errickson, died at New Monmouth, in the county of Monmouth, in November, 1877. She was about fifty-four years old. She was never married. Her next of kin were her sister Parmelia Errickson, a maiden lady, with whom she lived and had lived for many years, and her sister Susan, wife of George Fields, who, with her husband, filed the *caveat* against admitting the will to probate, but died soon after filing the *caveat*.

On the 3d of February, 1876, the testatrix went, with her second cousin, Parmelia E. Cross, a lady of mature years, to Hightstown, in Mercer county, and there employed Mr. Samuel M. Schanck, an attorney and counsellor at law of that place, to draw her will. He thereupon drew it according to her instructions. By it, after directing the payment

Errickson v. Fields.

of her just debts and funeral expenses, she gave all her property to her sister Parmelia, and appointed her second cousin, Charles J. Cross, of the city of New York, executor. Mr. Selanck, after drawing the will, placed a seal upon it, and handed it to the testatrix and her companion, at the same time giving them instructions as to the requisites to a proper formal execution of it, and advising that, as he was a stranger to her, and as he had heard that there had been some question as to whether she was of sound mind, its execution by her should be witnessed by persons who knew her, and knew that she had testamentary capacity. They took the will away, and subsequently the testatrix executed it in the presence of John H. King, then a neighbor of hers, and Miss Cross. She sent for Mr. King, and when he came to the house she came to the door and admitted him. After he entered the house she went out of the room, upstairs, for the will, and got it and brought it down, and, either just before or just after she brought it into the room, told him that she wanted him to witness her will. Before she signed it he asked her if she acknowledged it to be her last will and testament. She replied, yes. He then said to her, "Do you want your property or money to go as that paper calls for?" To which she answered, "Yes; I do not want Susan Fields to have any of my money, and would rather it would be in the middle of the sea than for George Fields to have it." The will was at the time lying open, on the table, before the testatrix and the witnesses. Miss Cross then wrote the words, "Hannah Errickson, her mark," at the foot of the will, and the testatrix thereupon took the pen out of her hand and made her mark in that place. After she had signed, King and Miss Cross signed as witnesses, at her request. After signing her name she said to Miss Cross, "Parmelia, now sign your name," but Miss Cross said, "No, let Mr. King sign his name first." Mr. King then, at the testatrix's request, signed his name, and then Miss Cross signed. During the signing the testatrix and the witnesses were seated at the same table, and they signed

Errickson v. Fields.

in the presence of each other. The will was executed with all the formalities required by the statute. Though the declaration that it was her last will and testament was made before the testatrix signed, it is a compliance with the statute which requires that a will be declared to be the last will of the person making it, in the presence of the witnesses. *Rieben v. Hicks*, 2 *Bradf.* 353; *Nipper v. Groesbeck*, 22 *Barb.* 670; *Mundy v. Mundy*, 2 *McCart.* 290. The testatrix, on the occasion of executing the will, called it her last will and testament.

That she knew what her property was, of what it consisted, and how it was invested, and was capable of selecting the objects of her bounty, and fully understood the business in which she was engaged, is evident not only from the testimony of the gentleman who drew the will, but from that of the witnesses to the execution. Mr. Schanck says she came to his office and asked him to write the will. That she herself dictated its contents, that she told him what she wanted, and he thinks that no other person gave any instruction as to the manner of writing that paper or its contents; that he undoubtedly read it over to her after it was drawn, and she was satisfied with it; that he thought at the time that she understood all that was said, either between himself and Miss Cross (her companion), or himself and the testatrix; that he does not recollect that Miss Cross said anything as to how the will should be drawn; that all that was done was in accordance with the instructions of the testatrix, and that he understood her speech (she had an impediment in her speech), but had to be attentive.

The testimony on the subject of incapacity falls short of establishing it. The abstract opinions of the caveators' witnesses, none of whom are experts, and among whom the testamentary witnesses are not included, are in themselves of no importance. Cyrenius Conover says he thinks "idiocy was her trouble; that she had no mind of her own;" and yet he appears to have had a conversation with her, as he

Errickson v. Fields

says, about a week before she died, in which she spoke very intelligently about her money, referring to it as in Mr. Wilson's hands, and saying that her sister Parmelia had been endeavoring to get it out of his hands for a good while, but that she herself was satisfied that Mr. Wilson should hold it. He appears to base his opinion on the fact that she habitually spoke disconnectedly, and talked to herself, and, as he says, never attended to any matter of business. But other people had no great difficulty in understanding her speech. King, one of the witnesses to the will, says she was a "great talker." Mr. Schanck understood her. She stammered. The fact that she talked to herself is not of itself evidence of incapacity. It appears from the testimony of this witness that the testatrix did most of the housework of the house in which she and her sister lived, and that when her sister was away from home, as she very frequently was, the testatrix took charge of and kept the house alone; that she was almost always entirely alone in the house during her sister's absence, which was sometimes over night—but sometimes the testatrix would come to his house and say that she was alone, and ask his daughter to come and stay with her, which his daughter would occasionally do.

George W. Crawford says the testatrix was weak-minded, but it appears, from his testimony, that he had known nothing of her for the last eighteen years. He says that though she would sometimes come over to his house and stay half an hour or so, and go back again, she did not go visiting or to church, as other women did. It appears, in the testimony in the cause, that her reason for not going to church was the impediment in her speech, which subjected her to ridicule, and her lameness. This witness testifies that she could write her name, and it appears that he accepted a deed from her, the consideration of which (\$4,000) he paid, and that the deed was drawn by Bennington F. Randolph, by whom the acknowledgment was taken, and her sister, Susan Fields, was one of the witnesses to her signature. And it may here be remarked, that there is no evidence of any deterio-

Errickson v. Fields.

ration in her condition of mind at all. Conover says: "Her mind and actions have been pretty much the same all the way through, so far as I have noticed." William S. Taylor also says that her mental capacity was always about the same. Benjamin Griggs says that he did not consider the testatrix either an idiot or a fool; that there were some things about business and property which he thinks she knew nothing about; that she used to go to church six or eight years ago, but for the last six years had not gone much, but might have gone on some extra occasion; and he adds that she was not "much of a hand to go visiting." Richard Luffburrow expresses an opinion that she was rather weak-minded and easily persuaded, but he has not seen her to talk with her for the last seventeen or eighteen years. William S. Taylor, though he says he considered her incapable of doing business, testifies that she understood him when he spoke to her about her property, and that she was anxious about it; and it further appears that, for a service he had rendered her in regard to it, he expected compensation, and that he accepted a cow from her, accordingly. In the transaction of which he speaks, which was the obtaining from Garret W. Errickson of a reconveyance of land which she had conveyed to him, and the conveyance of it to one Crawford, she was treated as competent to accept a reconveyance and execute a deed for the property. Mr. William V. Wilson, another witness for the caveators, says that "her grade of intellect was a cross between idiocy and foolishness;" but it appears from his testimony that he held her money under a power of attorney given under the direction of Judge Randolph and ex-Governor Bedle, and others; that at one time, when he had paid the testatrix's sister Parmelia \$500 of the money of the testatrix in his hands, he spoke to the latter about it, and she objected to it, and that he then wrote an agreement, to be signed by the testatrix; that she signed it, and he took it and kept it in his possession. He says that towards the last the testatrix made complaint to him; said she wanted her money; that

Errickson v. Fields.

she did not know how much he had; that she did not know the amount of interest, and that she said she wanted to lend the money to Schanck Conover and Mr. Kirkman; but he thinks she was then acting under the influence of those persons, who came with her to his house to borrow the money themselves. He further says that she said repeatedly, towards the last, that she did not want the money out of his hands; that she wanted him to keep it. He says she would, in talking, set up her will against her sister Parmelia's, and would complain that the latter was using up her money, and not letting her have any of it, but was spending it in legal proceedings. He testifies that when her sister Parmelia presented to him a bill against her, he spoke to the testatrix about it then and afterward, and that she objected to it because she thought her sister was charging her too much. It appears also, it may be remarked, by the testimony of other witnesses, that the testatrix objected to paying board to her sister during the illness of the latter, because she was then doing all the work of the house. Mr. Wilson says he almost invariably called the testatrix up when he paid interest due her to her sister, and, telling her what it was, and that he was about to pay it, asked her consent to the payment.

I do not deem it necessary to refer at length to the testimony on the subject of capacity, introduced by the proponent. It is enough to say that it shows that the testatrix, at the time when she made the will, was fully possessed of the requisite capacity for testamentary disposition of her property. And it may be remarked that it abundantly appears that she, for reasons which she gave, was unwilling that her sister Susan should have any part of her property. She expressed her dislike of her sister Susan's husband, and her unwillingness that he should have any of her money, declaring that she would rather have it thrown into the road and burned up. She said he had treated her and all the family so ill that she thought he ought not to have a cent, and she had tried to fix it so he could not get a cent. She said if

Stelle v. Conover.

she should die she would leave all to Parmelia, for if she should leave it to Susan she was afraid George Fields would get it. She said she had no one else except Parmelia to whom to leave her money. In 1875 she had a will drawn by Mr. Hallenbake, in which she gave her property to her sister Parmelia. She then selected the executors, and spoke intelligently about the disposition of her property. It may be added that the facts stated in the testimony of Mr. Hallenbake, who, for seventeen years, resided within one hundred yards of her, and at whose store she made purchases, establishes her testamentary capacity. Nor am I able to conclude, from the testimony, that the will was the result of undue influence on the part of Parmelia Errickson. It was natural that the testatrix, who had lived so long with Parmelia, should have given to her all her property. And it is by no means surprising that, with the feeling which she evinced towards Susan and her husband, she should not have given any part of her property to the former. There is evidence that both Parmelia and the testatrix had the same dislike towards them, but there is no evidence of influence on the part of Parmelia to induce the testatrix to give her property, by her will, to her. Each of the three sisters had had her share of their father's property, and it appears that the testatrix thought that Susan had no claim upon her, and no right to expect any part of her share.

The decree of the orphans court, refusing to admit the will to probate, will be reversed, with costs, to be paid out of the estate.

SAMUEL E. STELLE and others, executors, appellants,

v.

GARRET CONOVER and others, respondents.

The time limited by order of the orphans court, within which the creditors of an insolvent estate must present their claims or be barred,

Stelle v. Conover.

cannot, after the expiration of such time, and after notice has been given pursuant to the direction of the statute, be extended by a subsequent order.

Appeal from order of Middlesex orphans court.

Mr. D. R. Boice, for appellants.

Mr. W. P. Voorhees, for respondents.

THE ORDINARY.

The orphans court of Middlesex county, on the representation of the executors of Peter T. Stelle, deceased, late of that county, that his personal and real estate were insufficient to pay his debts, made, on the 16th of December, 1876, an order requiring creditors to exhibit their claims and demands against the estate, under oath or affirmation, within six months. The time so limited expired in six months from the date of the order. *Coppuck v. Wilson*, 3 Gr. 75. Nearly a month after the expiration of the six months, the court, on the 11th of July, 1877, made an order that the creditors of the estate have thirty days further time from the date of the last-mentioned order, in which to present their claims, under oath, to the executors. It does not appear by the record that there was any special reason for this action, nor does it appear on whose application, whether of creditors or executors, it was made, nor why it was made. It appears simply to have been made on application of Willard P. Voorhees, esq., but whether in his own right or as attorney for others, does not appear. The executors appeal from that order. The statute (*Rev. p. 770, Orphans Court, § 82*) provides that, "When any executor or administrator shall, by application in writing, represent to the orphans court of the proper county, on oath or affirmation, that the personal and real estate of the decedent is insufficient to pay the debts of the deceased, according to the best of his knowledge and belief, the said court shall thereupon direct

Stelle v. Conover.

the said executor or administrator to give public notice to the creditors of the estate to exhibit to such executor or administrator, under oath or affirmation, their claims and demands against the estate, within such time as the court shall direct and appoint, not exceeding eighteen months, nor less than six months, by setting up such notice in five of the most public places in the county, for the space of two months, and also by advertising the same for the like period in one or more of the newspapers printed in this state, as may be appointed by the said court, and such further notice, if any, as the said court shall direct."

And by section 94 (*Rev. p. 773*), it provides that, "Any creditor who shall not exhibit his claim to the executor or administrator as aforesaid, within the time limited and prescribed by the said court, shall be forever barred from prosecuting or recovering his said demand, unless the estate shall prove sufficient, after all debts exhibited and allowed are fully satisfied, or such creditors shall find some other estate not inventoried or accounted for by the executor or administrator before distribution, in which case such creditor shall receive his ratable proportion out of the same."

It will be seen that the order of July, 1877, was made not only after the court had exercised the power conferred by the statute in fixing the time within which the creditors were to exhibit their claims, but almost a month after that time had expired. As has been remarked, it does not appear that there was any reason whatever for their action. The court cannot thus extend the time for exhibiting claims against an insolvent estate. They are limited in their power in that respect by the provision of the section first above quoted; for the limitation there designated has reference to the time to be fixed in their order, made on the representation of insolvency; and when they have exercised their power, and the time so fixed has expired, and the notice has been given, the court cannot extend the time, even though the time fixed in the original order and that fixed in the extension do not together exceed the maximum time

Stelle v. Conover.

(eighteen months) fixed by the statute. The legislature obviously intended that the court should, once for all, fix the time in the order made on the representation of insolvency. Notice is to be given as directed by the statute, so that all creditors may be apprised of the necessity of exhibiting their claims.

The order for extension in this case provides for no notice whatever, and its effect would be to admit the creditor or creditors applying for it (but probably no others, seeing that, as before remarked, there is no requirement that notice shall be given), who are barred by their laches, to equal advantage with the diligent. Indeed, it may justly be regarded as the means by which the court have undertaken to relieve the applicant or applicants from the consequences of his or their neglect.

The order will be reversed.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY

MARCH TERM, 1879.

HARDENBURGH and others, executors,

v.

BLAIR and others.

1. The jurisdiction of the court of chancery to reach the property of a judgment debtor, held in trust for him, and apply it in satisfaction of a judgment at law, is defined and limited by the acts of 1845 and 1864 (*Rev.* p. 120, §§ 88-91). It does not extend to property held in trust for him or for his use, "where such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself."

2. These statutes should be liberally construed, so as to apply to such property as is enumerated in them, without regard to the means by which it came to the debtor—whether by gift, grant or devise—unless it be such property as is expressly excepted. Property reserved by law to the judgment debtor, and property and things in action held in trust for him, when such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself, are expressly excepted.

3. A legacy in the hands of an executor upon no other trust than to pay it over to the legatee, is not held in trust within the meaning of the exception in the statute. Such a legacy may be reached by a judgment creditor of the legatee, by proceedings under the statute.

Hardenburgh v. Blair.

But where a fund is given to executors with directions to invest it, and to pay to a legatee, during his life, the interest and income thereof, at such times, in such manner, and in such amounts as the executors shall deem prudent, there is present the essential qualities of a trust—confidence, discretion and active duties to be performed by the trustee—and the principal fund, and the interest and income thereof, are held in trust within the meaning of the exception in the statute. Neither the principal fund nor the accumulations of interest which the executors have kept back from the legatee for life because they have not deemed it prudent to pay it over to him, can be reached in the court of chancery by a judgment creditor of the legatee for life, and be applied in payment of the judgment, under the statute.

4. A testator gave to his executors the sum of \$250,000 in trust, to be kept safely invested, and to pay to his son the interest and income of such sum, at such times, in such manner, and in such amounts as his executors should deem most prudent, for and during his natural life, and upon his death, leaving issue, then to hold the said sum of \$250,000 for the benefit of such issue, &c.—*Held*,

(1) That the legatee for life was entitled to the whole interest and income derived from the investment, during his life, subject to a reasonable discretion on the part of the executors as to the times, manner and amounts of the payments.

(2) That accumulations of interest which the executors had in hand, which they had not deemed it prudent to pay to the legatee for life, cannot be reached by his judgment creditors in satisfaction of their judgments, either at law, by supplementary proceedings under the act concerning executions (*Rev. p. 393*), or in equity, under the statute above referred to.

On bill for the construction of the will of Charles G. Sisson, deceased.

On appeal from the decree of the chancellor, reported in *Hardenburgh v. Blair*, 3 *Stew.* 42.

Mr. L. Zabriskie and *Mr. R. Gilchrist*, for complainants.

Mr. H. S. White, for Charles G. Sisson, Jr.

Mr. J. A. Blair, *pro se*.

Mr. C. A. Hartshorne, for judgment creditors.

Hardenburgh v. Blair.

Charles G. Sisson, deceased, by his last will, proved April 31st, 1874, among other devises and bequests, made the following :

"I do give, devise and bequeath to my executors hereinafter named, and the survivors or survivor of them, the sum of one million of dollars, in trust as follows: That my executors, and the survivors and survivor of them, shall hold in trust for each one of my four children, Elias H. Sisson, Eva B., the wife of John Hull Browning, Charles G. Sisson, Jr., and Elizabeth B. Sisson, and his or her issue, the sum of two hundred and fifty thousand dollars, to be kept by my said executors safely invested, upon bond and mortgage, or other proper or approved security, and shall pay to each one of my said four children, at such times, in such manner and in such amounts as my said executors shall deem most prudent, the interest and income of such sum of two hundred and fifty thousand dollars so devised in trust for each, during his or her natural life, and upon the death of any or either of my said three children, Eva, Charles and Elizabeth, leaving issue him or her surviving, that the interest and income of such sum of two hundred and fifty thousand dollars so devised in trust for such child so dying, shall be applied and paid, as far as necessary and proper, in the opinion of my said executors, for the maintenance and support of such issue, until all such issue (or all who shall not have died before), shall attain the age of twenty-one years, and no longer, and when all such issue of any of my said three last-named children so dying, or the youngest of such issue living shall attain the age of twenty-one years (or if they shall all be at that age on the death of their parent), that then my said executors, or the survivors or survivor of them, shall pay over and transfer absolutely to such issue the whole of said sum of two hundred and fifty thousand dollars, and the accumulations thereof, if any there be, dividing the same equally between them, if more than one, in such manner that the children of a deceased child of my said three children shall take the share their parent would take if living. And if any of my said three children shall die without leaving issue living at the time of his or her death, or if, so leaving issue, such issue shall all die before the youngest living shall attain the age of twenty-one years, that then such sum of two hundred and fifty thousand dollars so devised in trust for such child and his or her issue, and the accumulations, if any there be, shall be equally divided among my remaining children, and the issue of such as may be dead, in manner aforesaid."

Hardenburgh v. Blair.

Mr. Robert Gilchrist, for appellants.

I. The court of chancery cannot appropriate the property of a debtor to the payment of his debts except under the heads of account, fraud, trust, accident, or mistake, or where the trust has ceased and is not active, or by virtue of some statutory authority.

Disborough v. Outcalt, Sax. 309, 310; *Woodruff v. Johnson*, 4 Hal. Ch. 729; *Frazier v. Barnum*, 4 C. E. Gr. 317; *Donovan v. Finn*, Hopk. Ch. 59; also, *Bacon v. Bonham*, 12 C. E. Gr. 209; 21 Conn. 1, 8, 9; 1 Otto 716.

Nor has the rule ever been otherwise in England. *Rider v. Kidder*, 10 Ves. 368. See, also, *Nichols v. Eaton*, 1 Otto 716; *Bacon's Abr., Execution, A*; *Gilbert on Executions* p. 37; 3 Black. Comm. 411-421; 4 Kent's Comm. 429; *English Statutes at Large*, vol. 6, p. 74; 3 Blackstone (Cooley's) 419, note (6); 3 Kerr's Blackstone; 2 Hovenden's Blackstone (18 ed.) 474, note 3, not in Chitty's edition; *Freeman on Executions*, § 6; *Higden v. Williamson*, 3 P. Wms. 132; *Dundas v. Dutens*, 1 Ves. 198; *Domett v. Bedford*, 6 T. R. 684; 3 Ves. 149; *Brandon v. Robinson*, 18 Ves. 429; *Wilkinson v. Wilkinson*, 3 Swans. 515, 522; *Nichols v. Eaton*, 1 Otto 716; *Piercy v. Roberts*, 1 Myl. & K. 4.

II. The jurisdiction of chancery in New Jersey, other than that under the heads of account, fraud, trust, accident or mistake, or where a trust has ceased and is no longer active, to appropriate a debtor's property to the payment of his debts, depends upon statutes which except out of their operation the case under discussion.

Disborough v. Outcalt, Sax. 309, 310; *Woodruff v. Johnson*, 4 Hal. Ch. 729; *Frazier v. Barnum*, 4 C. E. Gr. 317; *Bacon v. Bonham*, 12 C. E. Gr. 209.

III. But in this case the right of the receiver to get or sue for anything, is limited to "property or money, or things in action due him (the debtor), or held in trust for him, where the trust has been created by, or the fund held in trust has proceeded from himself."

Hardenburgh v. Blair.

IV. Whatever power a court of equity has over a trust fund to appropriate it to the payment of the *cestui que trust's* debts, it has this power only where there is a clear right in the *cestui que trust* himself to reach the fund by his own bill, under the equity head of jurisdiction, called *Trust*.

Hill on Trustees 485; *Pritchard v. Juinchant*, *Amb.* 126; 5 *Ves.* 596, note; 2 *Sugd. Powers* 183; *Godden v. Crowhurst*, 10 *Sim.* 642; *Perry on Trusts*, § 386 (a), (b); *Reife v. Geyer*, 59 *Pa.* 393; *Wells v. McCall*, 64 *Pa.* 207; *Twopenny v. Peyton*, 10 *Sim.* 487; *Piercy v. Roberts*, 1 *Myl. & K.* 4; *Lewin on Trusts* p. 538; *Hill on Trustees* 70, 486, 490, 492; *Lewin* 542, 543; *Liversey v. Harding*, *Taml.* 460; *Collins v. Vining, Cooper* (1837-8), p. 472; *Brandsen v. Woolredge*, *Amb.* 507; *Bennell v. Honeywood*, *Amb.* 708; *Mahon v. Savage*, 1 1 *Sch. & Lef.* 111; *Supple v. Lawson*, *Amb.* 729; *Potter v. Chapman*, *Amb.* 98; *Burrell v. Burrell*, *Amb.* 660; *Bristow v. Ward*, 2 *Ves.* 337; *Boyle v. Bish. of Petersburg*, 1 *Ves.* 299; *Att'y-Gen. v. Mosley*, 2 *DeG. & Sm.* 399; *Prendergast v. Prendergast*, 3 *H. L. Cases* 195; *Nichols v. Eaton*, 1 *Otto* 716; *Aleyn v. Belchier*, 1 *Lead. Cas. in Eq.* 304, and notes.

Mr. L. Zabriskie, for appellants.

I. Previous to the statutes of March 20th, 1845 (*P. L.* 141), March 7th, 1850 (*P. L.* 301), and April 12th, 1864 (*P. L.* 704), the court of chancery had no jurisdiction to aid a judgment creditor, in subjecting to the payment of his judgment such property of the debtor as could not be reached by execution, except in cases of fraud, or secret trust amounting to fraud. It would not come to his aid on the bare allegation that the debtor had rights in action or property in trust, which could not be made the subject of levy under an execution at law.

Disborough v. Outcalt, *Sax.* 298; *Woodruff v. Johnson*, 4 *Hal. Ch.* 729; *Whitney v. Robbins*, 2 *C. E. Gr.* 360; *Green v. Tatum*, 4 *C. E. Gr.* 105, 6 *C. E. Gr.* 364; *Higden v. Williamson*, 3 *P. Wms.* 131; *Moth v. Frome*, *Amb.* 394; *Brandson v. Robinson*, 18 *Ves.* 429; *Green v. Spicer*, 1 *Russ. & M.*

Hardenburgh v. Blair.

395; *Piercy v. Roberts*, 1 *Myl. & K.* 4; *Graves v. Dolphin*, 1 *Sim.* 66; *Snowden v. Dales*, 6 *Sim.* 524; *Twopenny v. Peyton*, 10 *Sim.* 487; *Godden v. Crowhurst*, *Id.* 642; *Younghusband v. Gisborn*, 1 *Coll.* 400; *Lord v. Bunn*, 1 *Y. & C.* 98; *Wilkinson v. Wilkinson*, 3 *Swans.* 514; *Pym v. Lockyer*, 12 *Sim.* 394; *Rockford v. Hackman*, 9 *Hare* 475; *Kearsley v. Woodcock*, 3 *Hare* 185; *Rippon v. Norton*, 2 *Beav.* 63; *Page v. Way*, 3 *Id.* 20; *Nichols v. Eaton*, 1 *Otto* 716; *Graff v. Bonnett*, 31 *N. Y.* 9; *Gott v. Cook*, 7 *Paige* 521; *Kane v. Gott*, 24 *Wend.* 641; *Hone v. Van Schaick*, 7 *Paige* 222; *Grout v. Van Schoonoven*, 1 *Sandf. Ch.* 336; *Clute v. Boole*, 8 *Paige* 83; *Stewart v. McMartin*, 5 *Barb.* 438; *Bramhall v. Ferris*, 14 *N. Y.* 81; *Graff v. Mason*, 4 *Sandf. Ch.* 357; *Bryan v. Knickabacker*, 1 *Barb. Ch.* 409; *Hadden v. Spader*, 20 *Johns.* 554; *Donovan v. Finn*, *Hopk. Ch.* 59; *Bogart v. Perry*, 1 *Johns. Ch.* 52; *Hendricks v. Robinson*, 2 *Id.* 283; *Bayard v. Hoffman*, 4 *Johns. Ch.* 450; *Partridge v. Gopp*, *Amb.* 596; *Taylor v. Jones*, 2 *Atk.* 600; *Demarest v. Terhune*, 3 *C. E. Gr.* 532; *Dundas v. Dutens*, 1 *Ves.* 196; *Rider v. Kidder*, 10 *Ves.* 368; *Bank of England v. Lunn*, 15 *Ves.* 569; *Horn v. Horn*, *Amb.* 79; *King v. Dupine*, 2 *Atk.* 60, note; *Frazier v. Barnum*, 4 *C. E. Gr.* 316; *Hallett v. Thompson*, 5 *Paige* 583; *Graff v. Mason*, 4 *Sandf.* 357, 2 *Barb. Ch.* 79; *Stewart v. McMartin*, 5 *Barb.* 438; *Graff v. Bonnett*, 31 *N. Y.* 9; *Lewin on Trusts* 538; *Hill on Trustees* 485; *Alleyn v. Belchier*, 1 *Lead. Cas. in Eq.* 304, and notes; *Perry on Trusts* 248.

Mr. Chas. H. Hartshorne, for respondents.

I. The interest of the defendant, Charles G. Sisson, in the fund sought to be reached, is absolute and assignable.

Wells v. Ely, 3 *Stock.* 175; *Lynch v. Utica Ins. Co.* 18 *Wend.* 245; *Gleason v. Fayerweather*, 4 *Gray* 348; *Hallett v. Thompson*, 5 *Paige* 583; *Livingston v. Stickles*, 8 *Paige* 398; *Van Rensselaer v. Hayes*, 19 *N. Y.* 68; *Smith Lead. Cas.* 100; *Newkirk v. Newkirk*, 2 *Cai.* 335; *McWilliams v. Risley*, 2 *Serg. & R.* 507; *Walker v. Vincent*, 19 *Pa.* 369; *Hanley v. Northampton*, 8 *Mass.* 3; *Schermerhorn v. Negus*, 1 *Den.* 448; 2 *Redf.*

Hardenburgh v. Blair.

on Wills, § 288 (note 30); *Rockford v. Hackman*, 9 *Hare* 475; *Keyser's Appeal*, 57 *Pa. St.* 236; *Kænig's Appeal*, 57 *Pa. St.* 352; *Wilkinson v. Wilkinson*, 3 *Swans.* 528; *Graves v. Dolphin*, 1 *Sim.* 66; 2 *Redf. on Wills*, § 289; 1 *Jarman on Wills* 816; *Hill on Trustees* 395; *Brandon v. Robinson*, 18 *Ves.* 429; *Graves v. Dolphin*, 1 *Sim.* 66; *Rippon v. Norton*, 2 *Beav.* 64; *Yarnold v. Moorehouse*, 1 *Russ. & M.* 364; *Snowden v. Dales*, 6 *Sim.* 524; *Piercy v. Roberts*, 1 *Myl. & K.* 4; *Younghusband v. Gisborne*, 1 *Coll.* 400; *Hallett v. Thompson*, 5 *Paige* 583; *DeGraw v. Clason*, 11 *Paige* 137; *Smith v. Moore*, 37 *Ala.* 330; *Robertson v. Johnson*, 36 *Ala.* 197; 10 *Ala.* 328; 27 *Ala.* 175; 2 *Ired. Eq.* 184; *Story Eq. Jur.* § 974 (a); *Ames v. Clark*, 106 *Mass.* 573; *Rome Exch. Bank v. Eames*, 4 *Abb. (N. Y.) App. Dec.* 83; *Tillinghast v. Bradford*, 5 *R. I.* 205; *Palmer v. Stevens*, 15 *Gray* 343; *Foley v. Burnell*, 1 *Bro. C. C.* 274; *Johnson v. Conn. Bank*, 21 *Conn.* 148; *Davenport v. Lacon*, 17 *Conn.* 278; *Watson v. Cleveland*, 21 *Conn.* 538; *Lewin on Trusts*, § 1; *Hill on Trustees* 488; *Aleyn v. Belcher*, 1 *Eden* 132; *Lead. Cas. in Eq.* 304 and notes; 4 *Kent Comm.* 330; *Lewin on Trusts* 735; *Wilkinson v. Wilkinson*, 3 *Swans.* 528; *Whitford v. Rickett*, 2 *Keen* 608; *Kean v. Leggett*, 2 *Sim.* 479; *In re Stultz's Trusts*, 4 *DeG. M. & G.* 404.

II. The court of chancery has power, without statute, by force of its inherent jurisdiction, to reach any kind of assignable property, that cannot be taken by execution at law, and to apply it in payment of a judgment against its owner.

Hadden v. Spader, 20 *Johns.* 554; *Bayard v. Hoffman*, 4 *Johns. Ch.* 450; *Hallet v. Thompson*, 5 *Paige* 583; *Tillinghast v. Bradford*, 5 *R. I.* 205; *Outcalt v. Van Winkle*, 1 *Gr. Ch.* 513; *Hays v. Doane*, 3 *Stock.* 84; *Bowne v. Scudder*, 1 *Vr.* 340; *Donovan v. Finn*, *Hopk. Ch.* 59; *Edmonston v. Hyde*, 1 *Paige* 637; *Tarbell v. Griggs*, 3 *Id.* 207; *Pendleton v. Perkins*, 49 *Mo.* 565; *McNab v. Heald*, 41 *Ill.* 326; *Story's Eq. Jur.* § 1214; *Trego v. Skinner*, 42 *Md.* 426; *Gordon v.*

Hardenburgh v. Blair.

Lowell, 21 *Me.* 251; *Bigelow v. Society*, 11 *Vt.* 283; *Rugby v. Robinson*, 10 *Ala.* 702; *Iron Co. v. Goodal*, 39 *N. H.* 223; *Tappan v. Evens*, 11 *N. H.* 326; *Disborough v. Outcall*, *Sax.* 309; *Woodruff v. Johnson*, 4 *Hal. Ch.* 120; *Halsted v. Davison*, 2 *Stock.* 290; *Wells v. Ely*, 3 *Stock.* 172; *Roberts v. Hodges*, 1 *C. E. Gr.* 300; *Whitney v. Robbins*, 2 *C. E. Gr.* 360; *Tantum v. Green*, 4 *C. E. Gr.* 105; 27 *Ind.* 384.

III. The original power of the court of chancery over this species of property is not divested or affected by the statute—the statute simply prescribing another method of reaching the same property.

McLeod v. Smith, 1 *Black* 459; *Darien v. Fairborn*, 1 *How.* 636; *U. S. v. Hair Pencils*, 1 *Paine* 400; *Dash v. Van Kleek*, 7 *Johns.* 479; *Columbian Manuf. Co. v. Vanderpool*, 4 *Conn.* 556; *Wallace v. Bassett*, 41 *Barb.* 92; *Crittenton v. Calson*, 5 *Cow.* 165; *Jackson v. Bradt*, 2 *Cai.* 169; *Gooch v. Stephenson*, 13 *Me.* 371; *Tyson v. Postlewaite*, 13 *Ill.* 727; *Dugan v. Gitting*, 3 *Gill* 138; 15 *Ga.* 361; *Davenport v. Barnes*, *Pen.* 211; *State v. Norton*, 3 *Zab.* 38; *Turball v. Griggs*, 3 *Paige* 207; *Edmerston v. Lyde*, 1 *Paige* 638; *McDermott v. Strong*, 4 *Johns. Ch.* 687; *Bay State Iron Co. v. Goodhall*, 39 *N. H.*; *Halsted v. Davidson*, 2 *Stock.* 290; 3 *Paige* 207, 234; 39 *N. H.* 223; *Leroy v. Rogers*, 3 *Paige* 234; *Ames v. Clark*, 106 *Mass.* 573; *Hallett v. Thompson*, 5 *Paige* 583; *DeGraw v. Clason*, 11 *Paige* 136; *Wells v. Ely*, 2 *Stock. supra*; *Halsted v. Davison, supra*; *Miller v. Mackenzie*, 2 *Stew.* 291.

IV. Assuming that the court has an inherent jurisdiction, independent of statute, to apply the equitable interest of the judgment debtor in payment of the judgment creditor's claim; then, in this case, the court will direct the executor to apply that equitable interest to that purpose through the receiver's hands.

V. Construction of the statute.

Hallett v. Thompson, 5 *Paige* 583; *DeGraw v. Clason*, 11 *Paige* 136; *Graff v. Bonnett*, 31 *N. Y.* 9; *Tillinghast v. Bradford*, 5 *R. I.* 205; *Outcall v. Van Winkle*, 1 *Gr. Ch.* 513.

Hardenburgh v. Blair.

VI. The trustees have *no discretion* with the *income already accumulated* and on hand, as against the *receiver*, who represents the *cestui que trust*, or a creditor for value.

Watson v. Cleveland, 21 Conn. 538; *Wells v. Ely*, 3 Stock. 173; *Bacon v. Bonham*, 12 C. E. Gr. 209.

VII. The *cestui que trust* is entitled to the *whole* of the *income* of the trust fund; the trustees' discretion is limited to the *times, manner and amounts* in which the *whole* income shall be paid.

Green v. Spicer, 1 Russ. & M. 395; *Piercy v. Roberts*, 1 Myl. & K. 4; *Stephens v. Lawry*, 2 Y. & C. 87; *Cowles v. Brown*, 4 Coll. 77; *Lewin on Trusts* 758.

DEPUE, J.

This bill was filed by the executors of Charles G. Sisson, deceased, for the aid and direction of the court of chancery in the execution of the trusts declared in the above-quoted (p. 647) clause of the testator's will.

The parties to the suit are Charles G. Sisson, Jr., one of the testator's sons above named, Van Antwerp and Mabie, judgment creditors of the said Charles, and Blair, who was appointed receiver under supplementary proceedings had upon said judgment.

The net income of the fund set apart by the testator for his son Charles, is over \$14,000 a year. Of this income the executors have in their hands a considerable sum, which they have kept back from him because they have not, in the exercise of their discretion under the trust imposed on them by the will, deemed it prudent to pay it over to him.

All the defendants answered.

The bill and answers filed present several questions for the consideration and direction of the court:

First. Charles, by his answer, claims that the executors are bound to pay to him the whole income of his share of the said trust funds as fast as it accumulates, and that they have not the discretion to withhold the same, or any part

Hardenburgh v. Blair.

thereof, from him, whenever he may demand payment thereof.

There is no direction that any portion of the interest or income, which the executors shall not have paid over to the life tenant, shall sink into the residue of the testator's estate; nor that accumulations from such a source shall go to increase the corpus of the fund. The direction for adding accumulations of interest to the principal applies only to the interest and income accruing after the death of the life tenants, which shall not be necessary for the maintenance and support of their issue during minority.

There is, in effect, no difference between the language in which the gift of the interest and income to the life tenant is made, and a gift in express words of the whole of the interest and income. It is an absolute and unqualified gift of the interest and income derived from the fund invested. The executors have a discretion with respect to the time, manner and amounts in which it shall be paid over, but this discretionary power, and the mode in which it shall be exercised, will not abridge or qualify the substantive gift to the life tenant of the interest and income. It is his absolutely, and any accumulations of interest during his life, not paid over to him, will, at his death, go to his personal representatives, and not to his issue, under the testator's will. *Green v. Spicer*, 1 *Russ. & M.* 395; *Barber v. Barber*, 3 *Myl. & Cr.* 688; *Bevor v. Partridge*, 11 *Sim.* 228. The distinction is between a mere power, which is left discretionary with the donee, and a trust in connection with which there is a discretion lodged with the trustee as to the manner in which it shall be performed. Simple powers, which are purely discretionary, are not imperative. Trusts are always imperative, and while a court of equity will not ordinarily interfere with the discretion of a trustee fairly exercised, yet it will not permit the discretion to be so exercised as to defeat the substantial purposes of the trust. 2 *Spence's Eq. Jur.* 81-88; 2 *Lead. Cas. in Eq.* 964, note to *Hastings v. Glyn*. The testator does not direct the payment of the accrued interest and

Hardenburgh v. Blair.

income to the life tenant at any stated time, either annually or otherwise. He expressly gives his executors a discretion as to the time, manner and sums in which the interest and income shall be paid over. They are not required to pay it over as fast as it accrues, or whenever demanded. They have a reasonable discretion over the subject, and the life tenant is entitled to the interest and income when collected by the executors, subject to a reasonable discretion on the part of the executors, as to the time, manner and amount of the payments.

Second. Blair claims to have paid to him, out of the accumulated interest in the hands of the executors, a sufficient sum to pay the judgment with respect to which he was appointed receiver. Van Antwerp and Mabie recovered a judgment in a court of law against the testator's son Charles, and Blair was appointed receiver, under supplementary proceedings for discovery, in aid of execution creditors, pursuant to the act concerning executions (*Rev. p. 393*).

The jurisdiction of a court of law to compel discovery of, and apply in satisfaction of a judgment, the property of the judgment debtor, which is not liable to levy and sale under an execution at law, is purely statutory. A court of law has no original or inherent jurisdiction over the subject. Its powers in the premises are such, and such only, as are conferred by statute. Whatever right Blair, as receiver, has in the moneys now in controversy, he must have acquired by force of the statute under which he was appointed. The twenty-fourth section of the act expressly limits the power of the judge to compel discovery, to cases in which the petition therefor shall allege a belief that the judgment debtor "hath property or money or things in action due to him, or held in trust for him, where the trust has been created by, or the fund held in trust has proceeded from himself." If no such property or things in action shall be discovered, the judge is required to dismiss the petition of the judgment creditors with costs. (*Rev. p. 394, § 27.*) But if the examination results

Hardenburgh v. Blair.

in such discovery that the judge is not compelled to dismiss the petition, then he is required to appoint a receiver "of the property and things in action belonging or due to, or held in trust for such debtor *as aforesaid*, who thereby shall receive authority to possess, receive, and, if need be, in his own name, as such receiver, sue for *such* property or things in action;" and such judge shall order said judgment debtor to convey and deliver to such receiver "all *such* property and rights in action, and the evidence thereof." (*Rev. p. 394, § 26.*) This statute enlarged the powers of courts of law in subjecting the property of a judgment debtor to the payment of the judgment debt. It enabled a court of law, by means of a receiver, to reach property which could not be levied on by execution, such as the choses in action of the defendant, which are incapable of being seized under execution, and property held in trust for him, which could not be levied on and sold under execution. In this respect the powers of the court were increased. But it is entirely clear, from a reading of the act, that its power over money and things in action, held in trust, was extended no further than to trusts created by the debtor himself. *Frazier v. Barnum*, 4 C. E. Gr. 316; *Mabbett v. Williams*, 2 Keyes 457; *Campbell v. Foster*, 35 N. Y. 361; *Freeman on Executions* § 420.

If the moneys in question are held in trust within the meaning of this statute, the trust not having proceeded from the debtor himself, Blair, as receiver, had no power over, and no right to collect or receive them, in virtue of his appointment as receiver, and therefore will not be entitled to any decree to that effect. In that event he has acquired no title or interest in the funds in dispute which this court can aid.

Third. But Van Antwerp and Mabie, the judgment creditors, are also parties to this suit as defendants. They set up their rights as judgment creditors, and claim that in equity the accumulated interest in the complainant's hands belonging to the judgment debtor, is chargeable with the payment of their judgment. Their answer is in the nature of a credit-

Hardenburgh v. Blair.

or's bill, and in this way the question, whether these moneys can in equity be reached, and applied in payment of a judgment creditor of the *cestui que trust*, is presented.

The jurisdiction of the court of chancery over this subject is also regulated by statute. The earliest act was that of March 20th, 1845, which was followed by a supplement passed April 12th, 1874. These two acts, in the revision of 1874, were embodied in the chancery act, as sections eighty-eight to ninety-four, inclusive. (*Rev.* p. 120.) By the act of 1845, on the return of an execution issued on a judgment at law, unsatisfied in whole or in part, leaving a balance due exceeding one hundred dollars, exclusive of costs, the plaintiff in the execution may file a bill in chancery to compel discovery "of any property or thing in action belonging to the defendant in such judgment, and of any property, money or thing in action due to him, or held in trust for him, except such property as is now reserved by law, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, *except when such trust has been created by, or the fund so held in trust has proceeded from some person other than the defendant himself,*" and the court was expressly empowered "to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgment out of any personal property, money or thing in action belonging to the defendant, or held in trust for him, *with the exception above stated.*" (*P. L.* 1845 p. 141). The supplement of 1864 is more specific in the enumeration of the property of the judgment debtor, which, by these proceedings, may be discovered, and by the decree of the court applied in satisfaction of the judgment. It enumerates debts due to the judgment debtor otherwise than for his labor or personal services, or for the labor or services of any member of his family, and money or property in possession or action held in trust for him, or for his use, "*except such property as is now reserved by law, or when such trust has been created by, or*

Hardenburgh v. Blair.

the fund so held in trust has proceeded from some person other than the debtor himself." In other respects the last-mentioned act merely regulated the mode of procedure. It gave the chancellor power forthwith, on filing the bill, properly verified, in term time or vacation, to make an order that the judgment debtor do appear before a master to make discovery, under oath, at such time and place as the chancellor should designate, instead of the dilatory and unsatisfactory method of discovery by answer; and authorized the appointment, under some circumstances, of a receiver *pendente lite*. (*P. L.* 1864 p. 704). In both these statutes, money or property in possession or action, held in trust for the judgment debtor is expressly excepted out of the jurisdiction of chancery, "when such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself."

But it is contended, on behalf of the judgment creditor, that, independently of the acts of 1845 and 1864, chancery had a jurisdiction which would enable it to reach the moneys in question and apply them in payment of the judgment debt of the *cestui que trust*.

An examination of the decisions of the English courts will show it to be there settled that an original jurisdiction of this kind did not pertain to its courts of equity. The powers of the court were simply in aid of the judgment creditor, where a trust had been interposed which obstructed the operation of the process of a court of law, and extended only to such property as, save for the interposition of the legal obstacle, might have been reached by such process.

Speaking on this subject, Lord Cottenham said: "What gives a judgment creditor a right against the estate is only the act of parliament, for, independently of that, he has no such right. The act of parliament gives him, if he pleases, the option by the writ of *elegit*. * * * The effect of the proceeding under the writ, is to give the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he

Hardenburgh v. Blair.

then comes into the court, not to obtain a greater benefit than the law (that is, the act of parliament) has given him, but to have the same benefit which he would have had at law if no legal impediment had intervened." *Neate v. Duke of Marlborough*, 3 *Myl. & Cr.* 416.

Mr. Lewin, after an examination of the cases, uses this language: "As equity only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel, of which the trust has been created, is not, in itself, amenable to any legal process." *Lewin on Trusts*, 648. In *Taylor v. Jones*, 2 *Atk.* 600, which Chancellor Kent said contained the great and leading doctrine in support of the creditor, the debtor had, in fraud of creditors, purchased stock with his own money, and vested it in trustees for the benefit of himself for life, and of his wife for her life, and afterwards for the benefit of his children. On a bill filed by his creditors to have his debts paid out of the stock, it was decreed that the trust estate be sold and applied in payment of the creditors, although the stock was not, at that time, subject to levy and sale under execution at law. The case was one infected with fraud, and the decision of the master of rolls was put on that ground. Now, although fraud is one of the heads of equity jurisdiction, yet *Taylor v. Jones*, and several other cases of the same kind, have been denied as contrary to correct principle, by a weight of judicial opinion that entirely destroys their value as precedents. *Lewin on Trusts* 648. The subject has since been regulated by acts of parliament, which expressly make a judgment debtor's equitable interest in lands, and also stock, funds, and annuities held by him in his own name, or in the name of another in trust for him, available for the payment of his debts. 1 & 2 *Vic.* 110; 27 & 28 *Vic.* 112. Under these statutes a judgment creditor, who has sued out an *elegit*, and is unable to obtain delivery of the land in which the judgment debtor has an equitable interest, by reason of the legal estate being outstanding, may apply to the court of chancery to remove the impediment, and for a delivery of

Hardenburgh v. Blair.

the land in execution (*Halton v. Haywood*, L. R. (9 Ch. App.) 229; and may have the order of a judge that stock, funds or annuities standing in the name of the judgment debtor, or in the name of another in trust for him, be charged with the payment of the judgment. 1 & 2 Vic. 100, § 14. Independently of these statutes, and the statutes relating to insolvent debtors and bankrupts, it is well settled in England, at the present time, that the jurisdiction of chancery in aid of a judgment creditor extends no further than to property of such a nature and description as might have been seized by the process at law if some legal obstacle had not been interposed.

Decisions under the bankruptcy and insolvent acts are inapplicable to the subject now in hand. They were made either upon the language of those acts, or were in furtherance of the policy on which they were framed. The bankrupt act of 13 *Eliz.*, c. 7, § 12, enacted "that the commissioners shall be empowered to assign over all that the bankrupt might depart withal." By the bankrupt act of 5 *Geo. II*, c. 30, § 1, there was assigned "all such effects of which the party was possessed or interested in, or whereby he hath or may expect any profit or possibility of profit, benefit or advantage whatsoever." The act of 6 *Geo. IV*, c. 16, § 63, provided for the assignment for the benefit of the creditors of bankrupts, of "all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him." Under the insolvent debtor's act the assignment was the voluntary act of the debtor, and as a legal consequence, transferred to the assignee all such rights and interests as were capable of assignment; and, the insolvent debtor's act of 7 *Geo. IV*, c. 57, § 11, provided for the assignment "of all the estate, right, title, interest and trust of such prisoner, both within the realm and abroad, and of all future estate, right, title, interest and trust of such prisoner, in or to any real or personal estate and effects within this realm or

Hardenburgh v. Blair.

abroad, which such prisoner may purchase, or which may revert, descend, or be bequeathed, or come to him or her." The assistance which the English courts of equity give to the assignee of the bankrupt or insolvent, to enable him to reach trust property or funds, is by virtue of their ordinary jurisdiction, in aid of legal rights conferred by act of parliament.

In New York, independently of enabling acts, it has been held that chancery had jurisdiction to sequester for the payment of debts, property not subject to execution at law when held on a trust created by a judgment debtor, with his own funds, in fraud of creditors. *Bayard v. Hoffman*, 4 Johns. Ch. 450; *McDermult v. Strong*, Id. 688; and *Hadden v. Spader*, 20 Johns. 554, are cases of this sort. The principle on which these cases rest is, that the debtor has placed his property upon a trust, out of the reach of creditors, in violation of the statute of frauds. But if these cases were well decided, they do not apply to a trust created by a third person for the benefit of the debtor. A trust of that kind, being a mere gratuity, is not in violation of the statute of frauds. The creditors of the beneficiary are neither misled nor defrauded thereby. *Nichols v. Eaton*, 1 Otto 716. Consequently, in *Donovan v. Finn*, *Hopkins* 59, it was held that a judgment creditor could not, by a proceeding in chancery, have his judgment satisfied out of a legacy given to the judgment debtor, there being no special grounds of equitable jurisdiction. Besides an act almost identical in terms with our statute, the legislature of New York has passed statutes on the subject of uses and trusts, by which the surplus of rents and profits beyond the sum necessary for the education and support of the person for whose benefit the trust is created, is made liable in equity to the claims of the creditors of such person in the same manner as other personal property which cannot be reached by an execution at law. The later New York cases are therefore not pertinent to the subject under consideration, except as they are authorities for the legal signification of the words, "when

Hardenburgh v. Blair.

such trust has been created by, or the fund so held in trust has proceeded from some other person than the defendant himself," which words are common to the statutes of both states.

The earliest and the leading case in this state is *Disborough v. Outcalt*, Sax. 298, decided in 1831, and before either of the chancery acts was adopted. In that case Chancellor Vroom held that courts of equity will consider the rights growing out of a judgment and execution at law as legal rights, and that, to warrant the interference of chancery in aid of an execution creditor, there must be some equitable ground presented; the case must be infected with fraud, or it must involve some trust or other matter of peculiar equity jurisdiction. What the character of the trust, in his opinion, should be, to bring it within the cognizance of equity, is apparent from the decision he made. The bill was filed by the complainant, a judgment creditor of Outcalt, to subject to the payment of his debts, lands which, at his request, had been conveyed to his son-in-law. The chancellor says: "The contract was made by Outcalt, and for his own benefit; he was to reside there; he had the management of the property, and procured the consent of his son-in-law to take the deed for the property; still Outcalt did not pay for the property, nor did he secure the payment; his creditors were not deprived of anything; there was no arrangement or transfer of property out of his possession into the hands of another, for the purpose of defeating creditors." On the grounds thus stated, the chancellor held that he could not interfere, and the bill was dismissed.

Next followed *Johnson v. Woodruff*, 4 Hal. Ch. 120, decided in 1849. The complainants were judgment creditors of the defendants, whose father, by his will, had devised to trustees a lot in the city of Newark, in trust, for the occupation and enjoyment of the defendant during his life, and, in case he did not choose to occupy the premises then, in trust to permit him to receive the rents, issues and profits. The defendant took possession of the property, and expended, in

Hardenburgh v. Blair.

erecting another house on part of the premises, a legacy his father had given to him absolutely. The bill was filed to have the rents and profits of the new house so erected by the judgment debtor, applied in satisfaction of the complainants' judgment. The chancellor held the complainants entitled to the relief prayed for, and decreed that a receiver of the rents of the new house be appointed, and directed that account be made of the value of the use of the ground occupied by the new house, to be deducted from the rents, and that the balance only be paid to the receiver. On appeal, the decree, with a modification limiting its operation to the life of the defendant, was affirmed by this court. In the judgment of affirmance, Chief Justice Green said: "The rule is well settled that a trust estate is not the subject of levy and sale under an execution at law. It was so decided by Chancellor Vroom, in *Disborough v. Outcalt, Sax.* 298. In that decision this court fully concur. It is equally clear that the trust created by the testator for the benefit of his son, will not be interfered with, nor the trust funds diverted from their destination, for the payment of the debts of the *cestui que trust*, either by a court of law or of equity." *Johnson v. Woodruff*, 4 *Hal. Ch.* 730. That case was decided after the chancery act of 1845 was passed. It is an important case, not only on account of the explicit language of Chief Justice Green, defining the powers of the court in assigning the reasons for the judgment pronounced, but also from the care observed in the decree to refrain from impairing any of the rights of the judgment debtor under the trust created for his benefit by his father's will.

In *Whitney v. Robbins*, 2 *C. E. Gr.* 360, the subject was considered by Chancellor Zabriskie, sitting as master. He held that the jurisdiction of chancery to collect the choses in action of a judgment debtor, and apply them in payment of his debts, had never been assumed in this state until it was conferred by the acts of 1845 and 1864. In a later case before him, as chancellor, the question

Hardenburgh v. Blair.

was directly presented for decision. The bill was filed by a judgment creditor, to subject to the payment of his judgment the interest due the defendant on a sum of money which the testator directed to be invested by his executors, the interest whereof he directed to be paid to the judgment debtor, as often as semi-annually, so long as she should remain unmarried. The chancellor denied relief, on the ground that the annuity which was due to the judgment debtor was derived from a fund held in trust for the debtor, which fund proceeded from some other person than the debtor herself. Speaking of the statute, the chancellor said: "It was to enable creditors to reach all the debtor's property, and to prevent his placing any of it in trust for himself, that this act was passed; and the exception was intended to permit any other person to provide a fund for the support or benefit of the debtor, and place it beyond the reach of creditors by placing it in trust." The cases cited are authorities directly in point, which cannot be evaded or explained away. They must be overruled in order to concede to the judgment creditors in this case the claim they have made. In my judgment these cases contain a correct exposition of the law on this subject.

If there were any doubt as to the limit and extent of the jurisdiction of chancery in the premises before the adoption of the statutes, that doubt has been removed by the statutes themselves. They were passed for the purpose of simplifying and making more efficacious the remedy of judgment creditors against the property of debtors, and with such a purpose in view, it is not supposable that the legislature would have curtailed the jurisdiction chancery already possessed, or excepted from the summary proceedings for reaching the debtor's property, a class of property over which chancery was left to exercise its jurisdiction by the tedious process of bill and answer, instead of the expeditious and searching remedy of the personal examination of the debtor, and the appointment of a receiver *pendente lite*. The statute must be regarded as defining the jurisdiction

Hardenburgh v. Blair.

of the court over trust funds in their application to the payment of debts, exclusive of any other authority in the court; otherwise the language excepting funds held on a trust created by another will be abrogated.

The enumeration in the statutes of what may be taken or collected by the receiver, or applied by the decree of the court in payment of the judgment, is of debts due to the judgment debtor otherwise than for his labor or personal services, or for the labor or services of any member of his family, and property in possession or action held in trust for him. The statute should be liberally construed so as to apply to such property as is enumerated, without regard to the means by which it came to the debtor, whether by gift, grant or devise. But we are not justified in pushing liberality of construction to the extent of overriding the plain language of the enactment. Property reserved by law to the judgment debtor from liability to debts, and property and things in action held in trust for him when such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself, are expressly excepted from the preceding enumeration. This plain language we are not at liberty to disregard. If the money in controversy is a fund held in trust, it is clearly within the legislative prohibition.

In *Wells v. Ely*, 3 Stock. 172, it was held that a legacy given to a third person upon no other trust than to pay it over to the judgment debtor, might be reached by the judgment creditor. The chancellor manifestly was of opinion that money in the hands of the legatee, simply to be paid to the judgment debtor, was money belonging to him, and not held upon any trust. This is apparent from the only authority cited in his opinion (*Lynch v. Utica Ins. Co.*, 18 Wend. 236), in which case the testator had devised the residue of his estate to his executors and their heirs and assigns, in trust, and after the payment of certain legacies he directed that the residue should be divided into eight equal parts, one of which he gave to his son, who was the judg-

Hardenburgh v. Blair.

ment debtor; and the court, in its opinion, makes a distinction between clear and simple trusts for the benefit of the debtor, and property in which the debtor has the entire interest, but which was nominally and formally vested in another. The former, it was held, could not be reached for the payment of the beneficiary's debts, but the latter could. That this was the view adopted by the chancellor in deciding *Wells v. Ely*, is also apparent from his opinion in *Halsted v. Davison*, 2 Stock. 290, in which he laid down the principle broadly, that a judgment creditor could not, in equity, subject to the payment of a judgment debt property in which an equitable interest had been secured to the debtor by a declaration of trust, where there had been no fraud, and no property of the debtor covered up to the prejudice of creditors. The observations made upon *Wells v. Ely*, are equally applicable to *Bacon v. Bonham*, 12 C. E. Gr. 209. In both cases it was properly held that a legacy in the hands of an executor, or of a third person, upon no trust but to pay it over, is not property held in trust within the meaning of the statutes. A legacy in the hands of an executor, who has no duty to perform in relation to it but to pay it over, and no discretion as to time of payment, may be recovered in an action at law (*Rev.* p. 581).

But in the present case neither the principal fund, nor its produce, is in the hands of the executors upon a simple obligation to pay. They are expressly required to hold the original fund for purposes of investment, and to pay over its interest or income, in their discretion as to time, manner and amounts. The peculiar and essential qualities of a trust—confidence, discretion and active duties to be performed by the trustee—are present in the trust which the testator has created. Moneys held in a fiduciary capacity, with respect to which such duties are to be performed, and such discretionary power to be exercised, are clearly moneys held upon a trust within the meaning of the statute. The bequests in *Frazier v. Barnum*, *supra*; in *Rider v. Mason*, 4 Sandf. Ch. 351; *Bramhall v. Ferris*, 14 N. Y. 41; *Graff v.*

Trustees of Public Schools v. City of Trenton.

Bonnet, 31 N. Y. 9, and in *Campbell v. Foster*, 35 N. Y. 361, were substantially the same as in this case, and the interest and income of the fund invested were regarded as held upon a trust within the meaning of the statute, the same as the primary fund invested.

Whether, upon considerations of public policy, property to so large an amount as that involved in this suit, should be enjoyed by a debtor without liability for the payment of his debts, is not a matter of judicial cognizance. That subject must be left within the discretion of the legislature for its regulation, if it seems politic or judicious to do so. It is sufficient for present purposes to say, that, in the existing state of legislation, jurisdiction to that end has been withheld from the courts.

In the respect last mentioned the decree should be reversed, but without costs.

Decision unanimously reversed.

THE TRUSTEES FOR THE SUPPORT OF PUBLIC SCHOOLS

v.

THE INHABITANTS OF THE CITY OF TRENTON.

1. The charter of the city of Trenton, approved March 19th, 1874, makes taxes imposed on lands a lien paramount to prior judgments, mortgages and other encumbrances thereon.

2. The provisions of the city charter giving taxes priority over judgments, mortgages and other encumbrances on the same premises, were not abrogated by paragraph 12, section 8, article IV, of the constitutional amendments of 1875.

NOTE.—The common law rule was that, "everything for the benefit of the king shall be taken largely, as everything against the king shall be taken strictly." *Coke's Case*, *Godbolt*, *Hobart*, C. J.; and courts are bound to take notice of everything relating to the queen's privilege. *Elderston's Case*, 2 *Ld. Raym.* 980.

So, by virtue of its prerogative, the crown or state is not liable for costs, except by express statute (*Wilkinson v. Allot*, *Cowp.* 366; *London*

Trustees of Public Schools v. City of Trenton.

3. Every system of taxation consists of two parts: the one relating to the assessment (the designation of the persons and things which shall be the subjects of taxation) and the apportionment of taxation among such persons and things, in the ratio prescribed by law; the other, the collection of the taxes assessed, by the enforced payment thereof. Paragraph 12, section 8, article IV, of the constitutional amendments, relates only to the assessment of taxes, and concerns only such equalization of the burdens of taxation as will result from the designation of the property which shall be the subjects of taxation, and the apportionment of the taxes thereon, under general laws, by uniform rules, and upon true valuations. The mere machinery by which taxes shall be assessed and collected, is left in legislative discretion.

4. The abrogation of a prior statute by a subsequent statute, or a subsequent constitutional provision which is self-executing, by reason of the repugnancy between the two, extends only so far as they are incompatible; in other respects the original law is left in full force and effect.

5. The provisions of the charter of the city of Trenton, preferring the lien for taxes over prior mortgages and other encumbrances, do not apply to mortgages made to the state, or its representatives, to secure the funds of the state invested on mortgage.

6. The immunity of the property of the state, and of its political subdivisions, from taxation, does not result from a want of power in the legislature to subject such property to taxation. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, the inference of law is, that the general language of statutes prescribing the property which shall be taxable, is not applicable to the property of the state, or its municipalities.

v. *Att'y-Gen.*, 1 *II. of L. Cas.* 440; *Reg. v. Beadle*, 7 *El. & Bl.* 492; *Moore v. Smith*, 5 *Jur. (N. S.)* 892; *State v. Kinney*, 41 *N. H.* 238; *State v. Barton*, 3 *Humph.* 13; *Governor v. Powell*, 23 *Ala.* 579; *Bradford v. Rowe*, 3 *Pick.* 17; *Houston v. Neuse River Co.*, 8 *Jones (N. C.) Law* 476; *State v. Harrington*, 2 *Tyler* 44; *Israel v. State*, 8 *Ind.* 467; *People v. Pierce*, 1 *Gilm.* 553; *Com. v. Todd*, 9 *Bush* 708; *People v. Clark*, 9 *N. Y.* 349; see *Reg. v. Bewdley*, 1 *P. Wms.* 207; *Com. v. Stebbins*, 4 *Gray* 25; *Charlotte Hall v. Greenwell*, 4 *Gill & J.* 407; *Hathaway v. Roach*, 2 *Woodb. & M.* 63; *Swan v. Colfax*, 2 *Tyler* 258); the rule applies to a *qui tam* (*O'Driscoll v. McCants*, 2 *Bay* 323; *Clark v. Dewey*, 5 *Johns.* 251; *State v. Stearns*, 11 *Fost.* 106); in cases of action by or against a county, see (*Edgar Co. v. Mayo*, 3 *Gilm.* 82; *Avery v. Slack*, 19 *Wend.* 50; *Com. v. McCuen*, 75 *Pa. St.* 215; *State v. Bommer*, *Busb. (N. C.) Law* 257; *Watson v. Moniteau Co.*, 53 *Mo.* 133; *Butman v. Fowler*, 17 *Ohio* 101; *Gillespie v. Broas*, 23 *Barb.* 370; *Young v. Buncombe*, 76 *N. C.* 316); or a township (*Hobbs v.*

Trustees of Public Schools v. City of Trenton.

7. The city of Trenton has no power to tax mortgages in which the funds of the state have been invested, though mortgages are expressly included in the enumeration of property subject to taxation; and from the fact that such mortgages are, by implication, excepted from that part of the statute which prescribes the subjects of taxation, it follows logically, as a necessary sequence, that they are not included in, or affected by, the other provisions of the statute which provide a mode for the collection of taxes.

8. Independently of any doctrine founded on the notion of prerogative, as a matter of construction, it must be clear, from the nature of the mischiefs to be reached, or the language used, that the government was in the contemplation of the legislature, before a court would be authorized to put a construction on a statute which would affect the rights of the state.

9. Mortgages made to the chancellor for investments of moneys in the court of chancery, which are required to be invested by the order of the chancellor, and in his name, are within the same principles of immunity from the operation and effect of the tax laws as apply to mortgages in which the funds of the state are invested.

On appeal from a decree of the chancellor, founded on the opinion of Barker Gummere, esq., a special master, reported in *Trustees of Public Schools v. Trenton*, 3 *Stew.* 618.

Mr. E. L. Campbell, for appellant.

Cowden, 20 *Ind.* 314; *Buckfield v. Gorham*, 6 *Mass.* 445; *Kennebeck v. Crossman*, 6 *Mass.* 458; *School Dist. v. Dean*, 17 *Mich.* 223; *Ex parte Bennett*, 3 *Den.* 175; *Township 19 v. Clark*, 1 *Ind.* 139; or a city (*Durkee v. Janesville*, 28 *Wis.* 464).

So, interest is not payable by a state, except by express contract (*State v. Thompson*, 5 *Eng. (Ark.)* 61; *State v. Bank of Washington*, 18 *Ark.* 554, 565; *Auditorial Board v. Arles*, 15 *Tex.* 72; *Att'y-Gen. v. Cape Fear Co.*, 2 *Ired. Eq.* 444; *State v. Mayes*, 28 *Miss.* 706; *Green v. State*, 53 *Miss.* 148; see *Swann v. Turner*, 23 *Miss.* 565; *Thorndike v. United States*, 2 *Mason* 1; *Respublica v. Mitchell*, 2 *Dall.* 101; *People v. Canal Co.*, 5 *Den.* 401; *Milne v. Rempublicam*, 3 *Yeates* 102; *Danforth v. Williams*, 9 *Mass.* 324; *State v. Sarratt*, 14 *Rich.* 177); in case of a county (*Maulson Co. v. Bartlett*, 1 *Scam.* 67); or a city (*Pekin v. Reynolds*, 31 *Ill.* 529; *Chicago v. People*, 56 *Ill.* 327); and whether statutes in regard to usury bind the king, see (*Willion v. Berkeley*, *Plowd.* 236; *Rex v. Ridge*, 4 *Price* 50).

As to the prerogative right of a state to fines, see (*People v. Bircham*, 12 *Cal.* 50; *Shoop v. Com.* 3 *Barr.* 126); or forfeitures (*Vermont v. Society*, 2 *Paine C. C.* 545; *Thompson v. Carr*, 5 *N. H.* 510; *Jackson v. Prevost*, 2

Trustees of Public Schools v. City of Trenton.

Mr. W. Y. Johnson and *Mr. J. P. Stockton*, attorney-general, *contra*.

Mr. E. L. Campbell, for appellants.

I. The lien for taxes, and the lien of certificates of sale for taxes, created by the charter of the city of Trenton, are first liens as against mortgages older in date.

Campbell v. Dewick, 5 C. E. Gr. 186; *Duncan v. Smith*, 2 Vr. 325. *Morrow v. Dows*, 1 Stew. 459, 464, does not apply; see also, *Hopper v. Malleson*, 1 C. E. Gr. 382; *Parker v. Baxter*, 2 Gray 185; *Bodertha v. Spenser*, 40 Ind. 353; *Dale v. McEvers*, 2 Cow. 118; *Butler v. Bailey*, 2 Bay 244; *Dunlap v. Gallatin Co.*, 15 Ill. 9; *Hutchins v. Moody*, 30 Vt. 658; 46 Ga. 412; 25 Gr. 103; 49 Mo. 586; 10 Pa. St. 466; *Freeholders v. State Bank at New Brunswick*, 2 Stew. 268.

II. The lien of the tax or certificates of sale is not affected by par. 12, sec. 7, art. IV, of the amended constitution.

State v. Hoffman, 1 Vr. 346.

III. The tax lien has its full force and vigor as a first lien against mortgages held by the trustees for the support of public schools, and those of the chancellor.

Mahon v. Crothers, 1 Stew. 567; *Freeholders v. State Bank at New Brunswick*, 3 Stew. 311; *Rev. p. 1152*, § 65; *Spangler*

Caines 164; *Den v. Clark*, *Coxe* 340; *Boyd v. Banta*, *Coxe* 266; *Wooldridge v. Lucas*, 7 B. Mon. 49; *Rogers v. Rawlings*, 8 Port. (Ala.) 325; *Conner v. Bent*, 1 Mo. 235; *Platner v. Sherwood*, 6 Johns. Ch. 118; *Montana v. Lee*, 2 Montana 124; *Rankin v. Rankin*, 6 Mon. 534).

The state is bound by public laws for the promotion of learning, the advancement of religion and the support of the poor, although not expressly named (*Bac. Abr., Statutes (I)* 7; *Vin. Abr., Statutes (E. 10)*, § 9; *Gladney v. Deavors*, 11 Ga. 79); but this rule is not to be construed so as to deprive the crown of any prerogative (1 *Wooddes*. 32; *Att'y-Gen. v. Newman*, 1 Price 438; *Vin. Abr., Statutes (E. 10)*, § 12; *Rex v. Armagh*, 8 Mod. 5).

Statutes for the furtherance of justice bind the state, as writs of error (*Rex v. Wright*, 1 Ad. & El. 484; *State v. Kroner*, 2 Tex. 492; *De Bode v. Reg.*, 13 Q. B. 364); or appeals from justices' orders (*Moore v. Smith*, 5

Trustees of Public Schools v. City of Trenton.

v. *York Co.*, 13 *Pa. St.* 325; *Parker v. Baxter*, 2 *Gray* 185; *Montgomery v. Trenton*, 11 *Vr.* 89; *Dungan's Appeal*, 68 *Pa. St.* 204; *People v. Doe*, 36 *Cal.* 220; *Bac. Abr.*, tit. *Prerogative* (*E.* 5); *U. S. v. Hoar*, 2 *Mason* 311, and cases cited; 1 *Black* 261; *Spen.* 48; *Shower's P. C.* 75; *Giles v. Grover*, 1 *Cl. & Fin.* 72; *State v. Grover*, 8 *Vr.* 174; *O'Hanlin v. Den, Spen.* 48, 51, 1 *Zab.* 590.

IV. Even if our lien weré the last, we would be entitled to have our money raised and paid to us, which is not done by the decree.

There is scarcely any limit to the number of instances which might be cited, in which this rule would not be held to operate, if in force at all in this state.

Attorney-General Stockton, for respondents.

I. The mortgages made to the trustees for the support of public schools, are the property of the state, dedicated by the constitution to the special trusts of education, and are not taxable.

Montgomery v. Trenton, 11 *Vr.* 91; *Rex v. Terrott*, 3 *East* 506; *Amherst v. Somers*, 2 *T. R.* 372; *Att'y-Gen. v. Hill*, 2 *Mee. & W.* 160; *Chicago v. Miller*, 80 *Ill.* 384.

Jur. (N. S.) 892; *Rex v. Allen*, 15 *East* 333); exemption of a debtor's chattels from execution (*Thompson on Exemp.*, § 385, et seq.; *Ford v. Com.*, 29 *Gratt.* 683; *Whiteacre v. Rector*, *Id.* 714); in actions by the king or state, the proceedings are the same as in suits by individuals (*Duke of Brunswick v. King of Hanover*, 6 *Beav.* 1; *Rowe v. Brenton*, 8 *Barn. & Cress.* 755; *Prioleau v. United States*, *L. R.* (2 *Eq.*) 659; *State v. Kroner*, 2 *Tex.* 492; *State v. Butts*, 3 *Ohio St.* 309; *People v. Rockwell*, 2 *Scam.* 3; *Stearns v. United States*, 2 *Paine C. C.* 300; *Sessions v. Stevenson*, 11 *Rich. Eq.* 282; *Com. v. Lery*, 23 *Gratt.* 21; *People v. Johnson*, 14 *Ill.* 342; *Mitchell's estate*, 2 *Watts* 87; *Dupont v. Downing*, 6 *Iowa* 172; *Finley v. Caldwell*, 1 *Mo.* 512; *State v. Nichols*, 39 *Miss.* 318); but a trial by jury cannot be demanded (*Harris v. Wood*, 6 *Mon.* 641); nor can the state be joined with an heir whose citizenship is doubtful, for the sake of preventing the abatement of a suit (*St. John v. West*, 4 *How. Pr.* 329).

So, the statute *de donis* (*Willon v. Berkeley*, *Plowd.* 227); *quia emptores* (*Id.* 240; see *People v. Van Rensselaer*, 9 *N. Y.* 291); relief of the poor (*Id.*

Trustees of Public Schools v. City of Trenton.

II. No construction can be given to the charter of the city of Trenton, or the general tax law, which would authorize the taxation of state property or the chancellor's mortgage.

People v. Doe, 36 Cal. 220; *Com. v. Morrison*, 2 A. K. Marsh. 524-536; *Att'y-Gen. v. Hill*, 2 Mee. & W. 160; *Parker v. Irons*, 6 Vr. 464; *Clark v. Grover*, 8 Vr. 174; *Rogers v. Woodnut*, 10 Vr. 654; *Howell v. Cornell*, 2 Vr. 374; *Gray v. Boston*, 15 Pick. 376; *Sweet v. Boston*, 18 Pick. 123; *Com. v. Campbell*, 33 Pa. St. 380; *Com. v. Cuyler*, 5 W. & S. App. 275.

III. Money in court is money in possession of the state, acting through its judicial and ministerial officers, and such possession is acquired by the exercise of the sovereign power of the state, under the direction of its courts, and is not liable to taxation.

In the matter of Killinger, 9 Paige 62.

IV. The assessment of 1875, for taxes, by virtue of the provisions of the charter of the city of Trenton, is not a prior lien to said mortgages.

Tindall v. Vanderbilt, 4 Vr. 38; *Hopper v. Malleson*, 1 C. E. Gr. 382; *Morrow v. Dows*, 1 Stew. 459; *State Trustees v. Reading*, 7 Vr. 66; *Golding v. Chambersburg*, 8 Vr. 258; *Tide Water Co. v. Coster*, 3 C. E. Gr. 219.

236; 11 Co. 68b; *Reg. v. Ponsonby*, 3 Q. B. 13); *Marlbridge*, of distresses (2 Inst. 142); discontinuances (2 Inst. 681.)

The rule that general words in a statute do not include the sovereign, unless expressly named, is also exemplified in the following instances: The statute of limitations (*Ang. on Lim.*, chap. V), including, in New Jersey, the political subdivisions of the state (*Cross v. Morristown*, 3 C. E. Gr. 311; *Jersey City v. State*, 1 Vr. 521; *Tainter v. Morristown*, 4 C. E. Gr. 47; *State v. Trenton*, 7 Vr. 198; see *Att'y-Gen. v. Newark*, 2 Hal. Ch. 201). Some exceptional cases are found (*Randal v. York*, Kirby 314; [contra, *Parmilee v. McNutt*, 1 Smeed & Marsh. 179]; *People v. Van Rensselaer*, 8 Barb. 189, 9 N. Y. 291; *Mitchell's Estate*, 2 Watts 87). An administrator's bond, although taken in the name of the state, is not within the rule (*Staté v. Pratte*, 8 Mo. 286); whether a transfer from an individual to a state, or vice versa, after the statute had begun to run, would suspend it, see (*United States v. Buford*, 3 Pet. 12; *United States v.*

Trustees of Public Schools v. City of Trenton.

V. The assessments of 1876 and 1877, for taxes, are not, by virtue of the charter of the city of Trenton, prior liens to said mortgages.

North Ward Nat. Bank v. Newark, 10 Vr. 380; *Morrow v. Dows*, 1 Stew. 459.

DEPUE, J.

The trustees for the support of public schools of the state of New Jersey filed this bill for the foreclosure of a mortgage upon certain premises in the city of Trenton. The complainants' mortgage was made on the 23d of April, 1861, and recorded on the 26th of the same month. It was given to secure \$5,000, money belonging to the public school fund, and invested by the trustees pursuant to the statute.

Upon the same premises there was a second mortgage, bearing date April 15th, 1867, for \$5,513.33, given by Taylor to the chancellor of the state of New Jersey as an investment of moneys in the court of chancery, invested in the name of the chancellor for the benefit of parties to a suit, and their representatives.

Taxes assessed against Taylor for the mortgaged premises for the years 1875, 1876 and 1877, were in arrear and are unpaid. The city of Trenton was made a party to the suit

White, 2 Hill (N. Y.) 59; *Levasser v. Washburn*, 11 Gratt. 572, 579; *Hall v. Gittings*, 2 Har. & Johns. 112).

The statute of frauds (*Rex v. Mann*, 2 Strange 749; *Rex v. Portington*, 1 Salk. 162; *Giles v. Grover*, 9 Bing. 128, 148; *Adlington v. Cann*, 3 Atk. 141, 154; see *Clark v. Shultz*, 4 Mo. 235; *Zickafoffe v. Hulick*, *Morris* 175; *State v. Baum*, 6 Ohio 155; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Thomas v. Harrodsburg*, 3 A. K. Marsh. 298; *Magdalen College Case*, 11 Co. 74 b).

Statutes in regard to set off (*Waterm. on Set Off*, § 39; also *Com. v. Rodes*, 5 Mon. 318; *Danley v. Whiteley*, 14 Ark. 687; *Borden v. Houston*, 2 Tex. 598; *Bates v. Republic*, 2 Tex. 616; *Pierce v. Boston*, 3 Met. (Mass.) 520; *Finnegan v. Fernandina*, 15 Fla. 379; *Lee Co. v. Govan*, 31 Ark. 610; *Newport Bridge Co. v. Douglass*, 12 Bush 673; *Cobb v. Elizabeth*, 75 N. C. 1; *Trenholm v. Charleston*, 3 S. C. 347; *White v. Governor*, 18 Ala. 767; *State v. Balt. & Ohio R. R. Co.*, 34 Md. 344; *Treasurers v. Cleary*, 3 Rich. 372; *Camden v. Allen*, 2 Dutch. 399; *Wayne v. Savannah*, 56 Ga. 448;

 Trustees of Public Schools v. City of Trenton.

on account of a claim by the city that, by its charter, taxes are a lien on lands with respect to which they are imposed, superior to prior mortgages and other encumbrances thereon. For the taxes of 1875 the premises were sold by the receiver of taxes on the 21st of April, 1876, and purchased by the city for the term of fifty years, and a certificate of sale was issued and delivered to the city on the 22d of the same month, pursuant to the requirements of the charter.

Section sixty-one of the act entitled "An act to provide for a more efficient government of the city of Trenton," approved March 19th, 1874, provides that "all taxes which may be hereafter assessed upon any lands, tenements and real estate in said city, shall be and remain a lien thereon for the amount of such tax, with interest thereon, and all costs and fees, for the space of two years from the date of the tax warrant, notwithstanding any devise, descent or alienation thereof, or any judgment, mortgage or encumbrance thereon." (*P. L.* 1874, p. 331.) This section must be construed in connection with the other sections of the charter, from section sixty-one to section seventy-three inclusive. By force of these provisions of the city charter, taxes are a lien on the lands for which they are imposed, to continue for the space of two years from the date of the tax warrant, without any further steps for its enforcement. If within that period the lien is not discharged by payment,

Att'y-Gen. v. Cape Fear Co., 2 *Ired. Eq.* 444; *Hibbard v. Clark*, 56 *N. H.* 155; *Franciscas v. Reigat*, 4 *Watts* 98, 476; *Himmelman v. Spanagel*, 39 *Cal.* 389; see, however, *Powers v. Central Bank*, 18 *Ga.* 658; *Miller v. Franklin Bank*, 1 *Paige* 444; *State v. Franklin Bank*, 10 *Ohio* 91; *Com. v. Todd*, 9 *Bush* 708; *Wood v. New York*, 7 *Hun* 164, 17 *Alb. L. J.* 492; *Com. v. Phoenix Bank*, 11 *Met.* 129; *Johnson v. Howard*, 41 *Vt.* 122; *Springfield v. Hickox*, 7 *Ill.* 241; as to a suit by a county, see (*Cannon v. Gartman*, 33 *Miss.* 581); or a school-district (*McCracken v. Elder*, 34 *Pa. St.* 239).

So, the following statutes have been held not binding on the sovereign, because not expressly named: awarding a *venire de novo* (*Rex v. Franklin, Parker* 4); amendments (*Reg. v. Tutchin*, 1 *Salk.* 51); jeofails (*Rex v. Talbot, Cro. Car.* 311); *venire de vicineto* (*Reg. v. Bewdly*, 1 *Wms.* 214); putting in a double plea (*Att'y-Gen. v. Allgood, Parker* 1; *Att'y-Gen. v. Donaldson*, 7 *M. & W.* 422; see *State v. Roe*, 2 *Dutch.* 215); subjecting

Trustees of Public Schools v. City of Trenton.

and steps are regularly taken for a sale, and a certificate thereof, and a declaration of sale pursuant to the charter, the purchaser will acquire a title to the premises for the period for which they were sold, not exceeding fifty years. This lien is given priority over judgments, mortgages and encumbrances, and the title of the purchaser at a tax sale is paramount to prior judgments, mortgages and other encumbrances.

These provisions of the charter of Trenton, making taxes the first lien on the lands for which they are imposed, are common to the cities generally in this state, but they are not contained in the general tax laws of the state. By the general statute, taxes are a lien only on the estate which the owner had at the time of the assessment, and mortgages and encumbrances prior to the assessment are unaffected by the tax, or by a sale in satisfaction thereof. *Morrow v. Dows*, 1 *Stew.* 459.

Though the priority of taxes over mortgages and other encumbrances in the city of Trenton, and in other cities where the same policy has been adopted, exists under legislation which is special and local, such legislation was not abrogated by paragraph 12, section 8, article 4, of the constitutional amendments of 1875.

The constitutional provision referred to is in the following words: "Property shall be assessed for taxes under

choses in action to levy under execution, (*Divine v. Harvie*, 7 *Mon.* 443); liberty to file a plea of *solvit post diem* (*Rex v. Ellis*, 1 *Price* 23); release from imprisonment for fraud in debt (*Appleton v. Hopkins*, 5 *Gray* 530); tolls on highways (*Weymouth v. Nugent*, 11 *Jur. (N.S.)* 465, 6 *B. & S.* 22; *Westover v. Perkins*, 2 *El. & El.* 57; *Rex v. Cook*, 3 *T. R.* 519; *Att'y-Gen. v. Donaldson*, 10 *M. & W.* 117; see *Dickey v. Maysville Co.*, 7 *Dana* 113; *State v. Com'rs*, *Cheves* 210; *People v. Com'rs*, 48 *Barb.* 157; *Foster v. Metts*, 55 *Miss.* 77); or customs (*Paul v. Shaw*, 2 *Salk.* 617); bankruptcy, insolvency or assignments for creditors (*supra* 318, *et seq.* notes; also, *Tellow's Case*, *Low.* 159); nor the following terms: "Party to a suit" (*Reg. v. Tuchin*, 3 *Ld. Raym.* 1066; *State v. Adair*, 68 *N. C.* 69; see *Patterson v. Shaw*, 6 *Ind.* 377; *Carlisle v. Sheldon*, 38 *Vt.* 440); "person or corporation" (*Penn. Co. v. Portage Co.*, 27 *Ohio St.* 14, 21; *Louisville v. Com.*, 1 *Duv.* 295; *State v. Atkins*, 35 *Ga.* 315); "defendants" (*Schuyler Co. v. Mercer Co.*, 4 *Gilm.* 20); "plaintiff" (*State v. Nichols*, 39 *Miss.* 318, 320); "demand-

Trustees of Public Schools v. City of Trenton.

general laws and by uniform rules, according to its true value." This constitutional provision executed itself, and, *proprio vigore*, abrogated all inconsistent special laws for assessing property for taxes which were in existence when the amendment went into operation. *State (North Ward National Bank, pros.) v. City of Newark*, 10 Vr. 380, 11 *Id.* 558. The abrogation of such special legislation resulted from its repugnancy to the constitutional provision, and the former became repealed by the latter by implication. To what extent this constitutional provision operated to abrogate special and local legislation for the laying, levying, assessment and collection of taxes, is a matter of construction. The appropriate rules of construction have been adjudged in a series of cases (relating to the construction of statutes) of long standing. Every statute is a repeal by implication of a precedent statute, so far as the later statute is repugnant to its predecessor; the provisions of the pre-existing statute, so far as they are incompatible with a later statute, are repealed, but in other respects the original law is left in full force and effect. The old law gives way to the newer and later enactment only to the extent of the repugnancy between the two. *Bac. Abr., Statute (D)*; *Wood v. United States*, 16 *Pet.* 342; *Industrial School v. Whitehead*, 2 *Beas.* 290; *Mechanics and Traders Bank v. Bridges*, 1 *Vr.*

ants" (*Rex v. Franklin, Parker* 4); "creditors" (*State v. Thompson*, 10 *Ark.* 61, 68; *Daniels v. Nelson*, 41 *Vt.* 161); condemnation of lands by statutory proceedings in eminent domain (*Jones v. Tatham*, 20 *Pa. St.* 398; *Com. v. B. & M. Co.*, 3 *Cush.* 25; *Stevens v. Paterson R. R. Co.*, 5 *C. E. Gr.* 126; *Penn. R. R. v. Long Branch R. R.*, 8 *C. E. Gr.* 157; *State v. Montclair*, 6 *Vr.* 328; *Indiana R. R. v. State*, 3 *Ind.* 421; *Drvis v. East Tennessee R. R.*, 1 *Sneed* 94; *St. Louis R. R. v. Trustees*, 43 *Ill.* 303; *United States v. Railroad Bridge Co.*, 6 *McLean* 517; *Doe v. Archbishop of York*, 14 *Q. B.* 81; *Atlanta v. Central R. R. Co.*, 53 *Ga.* 120; *Ninth Ave. Case*, 45 *N. Y.* 729); requiring bonds to be drawn on stamped paper (*State v. Milburn*, 9 *Gill* 105); forbidding suits for less than \$100 to be brought in the superior courts (*State v. Garland*, 7 *Ired.* 48; see *State v. Atkins*, 35 *Ga.* 315); rendering a person under sentence for felony incompetent as a witness (*State v. Adair*, 68 *N. C.* 69); issuing *scire facias* on a judgment (*Com. v. Baldwin*, 1 *Watts* 54; *Nimmo v. Com.*, 4 *Hen. & Munf.* 57).

 Trustees of Public Schools v. City of Trenton.

112. The principle on which this rule of construction rests is applicable alike to statutes and constitutional provisions. The effect of constitutional provisions and restrictions on prior legislation, and their interdict on subsequent legislatures, extends no further than to such laws as are plainly repugnant to the constitutional requirement or prohibition.

Every system of taxation consists of two parts: the one relating to the assessment (the designation of the persons and things which shall be the subjects of taxation) and the apportionment of taxation among such persons and things in the ratio prescribed by law; the other, the collection of the taxes assessed, by the enforced payment thereof. Incident to both these departments of taxation, is the machinery by which the assessment shall be made, and its collection enforced. This classification of laws relating to taxes is recognized, and was acted upon by the supreme court in *Mechanics and Traders Bank v. Bridges*, *ubi supra*.

The constitutional provision invoked relates only to the assessment of taxes, and in that respect it concerns only such equalization of the burdens of taxation as will result from the designation of the property which shall be the subjects of taxation, and the apportionment of the taxes thereon under general laws, by uniform rules and upon true valuations. The reasons which induced the adoption of this con-

Statutes imposing taxes do not extend to or include the property of the sovereign (*Rex v. Cook*, 3 T. R. 519, 522; *Mersey Docks v. Cameron*, 11 H. of L. Cas. 443, 464; *Reg. v. McCann*, L. R. (3 Ex. Ch.) 677; *People v. Doe*, 36 Cal. 220; *Ryan v. Gallatin Co.*, 14 Ill. 78; *Buckley v. Osburn*, 8 Ohio 180, 187; *Nashville v. Bank of Tenn.*, 1 Swan 269; *Augusta v. Dunbar*, 50 Ga. 387; *Directors v. School Directors*, 42 Pa. St. 22; *People v. Salomon*, 51 Ill. 37; see *Louisville v. Com.*, 1 Dur. 295; *Lane v. Oregon*, 7 Wall. 71); or, having assessments (*Holford v. Copeland*, 3 Bos. & Pul. 129, 140; *Soady v. Wilson*, 3 Ad. & El. 248; *Att'y-Gen. v. Donaldson*, 10 M. & W. 117; *Williams v. Gravel Road Co.*, Wils. (Ind.) 7; *Rex v. Mathews*, Cald. 1; *Reg. v. Ponsonby*, 3 Q. B. 13; *Darlington v. New York*, 31 N. Y. 164; *Chicago v. Hasley*, 25 Ill. 595; *Fagan v. Chicago*, 84 Ill. 227; *Nether-ton v. Ward*, 3 B. & Ald. 21; see *Whiteley v. Fawcett*, Styles 12).

The following are ratable: A keeper of a royal park, who gives his services as rent for a lodge therein, which he occupies (*Rex v. Mathews*, Cald. 1; *Lord Bute v. Grindall*, 1 T. R. 338, 2 H. Bl. 265); the owner of

Trustees of Public Schools v. City of Trenton.

stitutional provision are deep-seated in principles of public policy. Its object was to secure to the people of the state the equalization of taxation, so far as was practicable, by requiring the imposition of taxes on property by general laws, on the principle of uniformity in the subjects of taxation and in valuations. Whether taxes shall be assessed by an officer elected by the people, and called an assessor, or by a commissioner appointed by a municipal body—whether they shall be collected by an elected officer called a collector of taxes, or by a receiver, holding his office by virtue of some other authority, and payment thereof enforced by a tax warrant leviable on goods and chattels, or on the person, or by a lien upon and sale of property, real or personal, are matters of little importance, which the framers of the constitutional amendments wisely left to legislative discretion. Statutes regulating these subjects in force when the constitutional amendments were adopted, though local and special, were not abrogated, nor is such legislation in the future interdicted by this amendment. How far and within what limits future legislation of this character, considered as special and local legislation, may be controlled by the other constitutional amendments, has not been considered.

Having reached the conclusion that in the city of Trenton, as a general rule, taxes are a lien paramount to prior mort-

premises rented by the crown (*Eckersall v. Briggs*, 4 T. R. 6); the pipes of a water company, laid through royal demesnes (*Rex v. Chelsea*, 5 Barn. & Adol. 156); the present interest of a land owner, where the state is entitled to the reversion (*Bridge Prop'rs v. State*, 1 Zab. 384, 2 Zab. 593; *Fall v. Marysville*, 15 Cal. 391; see *Ryan v. Gallatin Co.*, 14 Ill. 78); lands leased by the state to a corporation (*State v. Haight*, 7 Vr. 471; see *Buckingham v. Reeve*, 19 Ohio 399). State bonds may be taxed (*People v. Home Ins. Co.*, 29 Cal. 533; *Webb v. Burlington*, 28 Vt. 188; see *People v. New England Ins. Co.*, 26 N. Y. 303); but not by a city (*Augusta v. Dunbar*, 50 Ga. 387); or city bonds (*State v. Woodruff*, 8 Vr. 139; *British Com. Ins. Co. v. Com'r*, 18 Abb. Pr. 118, 1 Keyes 303); but not by a city (*Murray v. Charleston*, 96 U. S. 342.)

Independently of any statutory or constitutional provision, the property of the sovereign is exempt from taxation.

Trustees of Public Schools v. City of Trenton.

gages and other encumbrances on the lands with respect to which the taxes were laid, the inquiry arises, whether the two mortgages involved in this case are subordinated to such priority of lien.

The general doctrine of the law is, that liens take precedence in the order of priority in date. The power of the legislature, in virtue of its sovereignty, to make taxes a lien upon the estate of all parties interested in the land, and to make the tax title paramount to all other and prior claims and encumbrances, is not denied. *Hopper v. Malleson*, 1 C. E. Gr. 386, *per Green, C.*; *Morrow v. Dows*, 1 Stew. 463, *per Van Syckel, J.*; *Campbell v. Howland*, 5 C. E. Gr. 186; *Parker v. Baxter*, 2 Gray 185; *Dale v. McErers*, 2 Cow. 118. The displacement of prior encumbrances, prejudicial to individual rights, can only be effected by the exercise of the sovereign power of taxation. It may be, and frequently is, the occasion of injustice, and therefore will not be presumed in the absence of a clear expression of legislative intent. In the city of Trenton, as we have seen, such priority is given by statutory provisions contained in its charter. Can these statutory enactments be permitted, under the ordinary rules of construction, to affect the mortgages now in question?

The mortgage of the complainants was given to secure an investment of funds set apart for the support of public schools. By the constitution, the fund for the support of

This includes, among others, the following: unoccupied lands (*Dixon v. Porter*, 23 Miss. 84); lands dedicated for streets, even before acceptance (*Plumstead Board v. British Land Co.*, L. R. (10 Q. B.) 203; see *State v. Hudson*, 5 Vr. 25, 531; *Ellsworth v. Grand Rapids*, 27 Mich. 250); a post-office (*Smith v. Birmingham*, 7 El. & Bl. 483); royal palaces (*Att'y-Gen. v. Donaldson*, 10 M. & W. 117); but occupiers by permission are ratable (*Reg. v. Ponsonby*, 3 Ad. & El. 14); the horse guards (*Amherst v. Somers*, 3 T. R. 372; see *Eckersall v. Briggs*, 4 T. R. 6; *Rex v. Hendis*, 3 T. R. 497; *Rex v. Terrott*, 3 East 506); the invalid office (*Peyton's Case*, *Leach's Cr. Cas.* 300); the inns of court (*Leus v. Brown*, 1 Car. & P. 224; *Rex v. Butterworth*, 2 Car. & P. 391; see *Moss v. London*, 4 El. & Bl. 670); the admiralty (*Reg. v. Stewart*, 8 El. & Bl. 360); the local police (*Lancashire v. Strelford*, El. Bl. & El. 225); county court buildings (*Hodgson v. Carlisle*, 8 El. & Bl. 116; *Reg. v. Castle View*, L. R. (2 Q. B.) 493; *Reg. v. Manchester*, 3 El. & Bl. 336; *Lancashire v. Cheetham*, L.

 Trustees of Public Schools v. City of Trenton.

free schools, and all money, stock and other property appropriated for that purpose, or received into the treasury to augment the said fund, is required to be securely invested, and to remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, is required to be annually appropriated to the support of free schools; and it is declared that it shall not be competent for the legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretence whatever. (*Constitution* p. 6, *Section 7, Article IV*).

The discussion of this case has been had upon broader grounds, and aside from this constitutional provision, with the view of obtaining the opinion of this court as to the effect of the priority of taxes under statutes upon securities in which the funds of the state generally are invested; and that question is directly involved in this case, in considering the claim of the city to priority over the mortgage given to the chancellor. The case will therefore be examined exclusively on that ground. The constitutional protection of the school fund is referred to, that no inference may be drawn from this opinion that the legislature has the capacity to impair the integrity of that fund, or the produce of its investments, by methods which are, direct or indirect,

R. (3 Q. B.) 14; *Reg. v. Worcestershire*, 11 Ad. & El. 57; *Tracey v. Taylor*, 3 Q. B. 936; or masters in chancery as occupiers (*Holford v. Copeland*, 3 Bos. & Pul. 129); or a jail (*Reg. v. Shepherd*, 1 Q. B. 170; *Bedfordshire v. Church-wardens*, 7 Exch. 650); the king's dock-yards (*Att'y-Gen. v. Hill*, 2 M. & W. 160); any public occupier of docks (*Reg. v. Liverpool*, 9 Ad. & El. 435; *Reg. v. Beverly*, 6 Ad. & El. 645; *Reg. v. St. George*, 10 Q. B. 852; see *Rex v. Liverpool*, 7 Barn. & Cress. 61; *Mersey Docks v. Cameron*, 11 H. of L. Cas. 413); a prison (*Gambier v. Lydford*, 3 El. & Bl. 346); a museum built on crown lands (*Beche v. St. James*, 4 El. & Bl. 385); municipal lands, although without the city bounds (*Reg. v. Exminster*, 12 Ad. & El. 2; see *Reg. v. Oldham*, L. R. (3 Q. B.) 474); or used as a commons (*Lincoln v. Holmes Common*, L. R. (2 Q. B.) 482; see *Rex v. York*, 6 Ad. & El. 419; *Rex v. Alnwick*, 9 Ad. & El. 441; *St. Louis v. Gorman*, 29 Mo. 593); a bridge belonging wholly to the crown (*Reg. v. McCann*, L. R. (3 Q. B.) 677); stone for the use of the government (*Weymouth v. Nugent*, 6 B. & S. 22; see *Andrews v. Auditor*, 28 Gratt. 115;

Trustees of Public Schools v. City of Trenton.

either under the powers of taxation or by any other means whatever.

The immunity of the property of the state, and of its political subdivisions, from taxation, does not result from a want of power in the legislature to subject such property to taxation. The state may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable, is not applicable to the property of the state or its municipalities. Such property is, therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it. *Cooley on Taxation* 131. Hence crown lands, and the property of the state, or its political sub-divisions, are not taxable under general statutes providing for taxation. *Att'y-Gen. v. Morris*, 2 M. & W. 159; *Mersey Docks v. Cameron*, 11 H. of L. Cas. 443; *Inhabitants &c. v. County Com'rs*, 4 Gray 500; *Worcester County v. Worcester*, 116 Mass. 193; *State v. Gaffney*, 5 Vr. 131. Under the general

Reg. v. Hall, 4 El. & Bl. 29); salaries of state judges (*Com. v. Mann*, 5 Watts & Serg. 403; *New Orleans v. Lea*, 14 La. An. 197; see *Gilkeson v. Frederick*, 13 Gratt. 577); or, of a prothonotary (*City Council v. Lee*, 3 Brev. 226; see *Cohen v. Com.* 6 Pa. St. 111); public school-houses (*Gerke v. Purcell*, 25 Ohio St. 229; *Ward v. Manchester*, 56 N. H. 508; *Curtis v. Whipple*, 24 Wis. 350); lands held by a city in trust for public schools of the state (*Chicago v. People*, 80 Ill. 384); state universities (*Trustees v. Champaign Co.*, 76 Ill. 184); lands forfeited to or bid in by the state for non-payment of taxes (*Buckley v. Osburn*, 8 Ohio 180, 187; see *Tipton Co. v. State*, 24 Ind. 255; *Gould v. Day*, 94 U. S. 405); a city cemetery (*People v. Doe*, 36 Cal. 220; see *Louisville v. Nevin*, 10 Bush 549; *Baltimore v. Greenmount Cemetery*, 7 Md. 517; *Woodlawn Cemetery v. Everett*, 118 Mass. 354); a corporation belonging wholly to the state (*Nashville v. Bank of Tenn.*, 1 Swan 269; *Bank v. New Albany*, 11 Ind. 139; *Georgia v. Atkins*, 35 Ga. 315; see *Veazie Bank v. Fenno*, 8 Wall. 533; *State v. Bank of Newbern*, 1 Dev. & Bat. Eq. 216); a state asylum for lunatics

Trustees of Public Schools v. City of Trenton.

tax law of this state, public property, whether belonging to the state or its subordinate political divisions, such as counties, cities, towns and townships, is not liable to taxation. The city of Trenton had no power to levy a tax directly upon the mortgage of the complainants, though mortgages are expressly included in the enumeration of property liable to taxation. From the fact that the property of the state is, by implication, excepted from that part of the tax laws which prescribes the subjects of taxation, it follows logically, as a necessary sequence, that its property is not included in or affected by the other provisions of the law, which provide a mode for the collection of the taxes.

The complainants' mortgage was executed and delivered in 1861. The earliest of the annual taxes remaining unpaid occurred in 1875. It is not necessary to discuss the extent to which the common law prerogatives of the crown have been succeeded to by the state. In some respects the state is not endued with the prerogatives of the king. Where the state goes into the market for the investment of money, it takes its securities subject to the vested rights of property of private individuals. This must necessarily be so under a government which protects private property against the state by constitutional prohibitions. Consequently, a mortgage given to the state or its representatives for public moneys

(*Williams v. Little White Lick Co.*, 1 Wils. (Ind.) 7); county lands (*Gibson v. Howe*, 37 Iowa 168; see *Townsen v. Wilson*, 9 Pa. St. 270; *Moore v. Morledge*, 42 Iowa 26); a county poor-house (*Phila. v. Amer. Philosoph. Soc.*, 42 Pa. St. 21); or court-house or jail (*Worcester Co. v. Worcester*, 116 Mass. 193; *Piper v. Singer*, 4 Serg. & Rawle, 354); state or city parks (*Doyle v. Austin*, 47 Cal. 353; *People v. Salomon*, 51 Ill. 37, 52); a city hall (*Louisville v. Com.*, 1 Duv. 295); or reservoir (*State v. Gaffney*, 5 Vr. 133); or wharf (*Low v. Lewis*, 46 Cal. 549); churches from which no profit is made (*Rex v. Woodward*, 5 T. R. 79; *Rex v. Agar*, 14 East 255; *State v. Jersey City*, 4 Zab. 108, 120).

How far a state, by becoming interested as a stockholder or part owner of a corporation, divests herself of sovereignty, see (*Freeholders of Middlesex v. State Bank*, *supra*, p. 317, note; also, *State v. Great Miami Co.*, 14 Ohio 405; *Bank of U. S. v. McKenzie*, 2 Brock. 393; *State v. Central Co.*, 10 Humph. 388; *Dobbins v. Orange R. R.*, 37 Ga. 240; *Att'y-Gen. v. Bank of Cape Fear*, 5 Ired. Eq. 71; *Ernst v. Ernst*, Breese 316; *Biscoe v.*

Trustees of Public Schools v. City of Trenton.

invested, will be subject to all prior estates in the mortgaged premises, and all liens and encumbrances thereon actually vested antecedently in private individuals. The complainants do not rely on the prerogative right of the state to a preference of debts due to it over debts or liabilities accruing to others. Their mortgage, by the ordinary rules of law, is such a common law conveyance as, between private citizens, would create a lien having relation to the time of its execution and delivery. The priority thus acquired by the complainant, the city endeavors to displace by force of the provisions of its charter. The complainants deny that these provisions of the city charter are applicable to the state.

The common law doctrine is, that where the king has any prerogative, right, title or interest, and the statute is general, he shall not be barred of them by the general words of the act, for the king shall not be bound unless the statute is made by express words to extend to him. *Magdalen College Case*, 11 Co. 74; *Plowden* 239; *Bac. Abr., Statutes (E.)* Independently of any doctrine founded on the notion of prerogative, the same construction ought to prevail, founded upon the legislative intent. Where the government is not expressly, or by necessary implication, included, it ought to be clear, from the nature of the mischiefs to be reached,

Coulter, 18 Ark. 423; *Bank of Ky. v. Wister*, 2 Pet. 318; *U. S. Bank v. Planters Bank*, 8 Wheat. 904; *Bank v. Gibbs*, 3 McCord 377; *Nashville v. Bank of Tenn.*, 1 Swan 269; *Dyer v. Bank of Mobile*, 14 Ala. 622; *Bank of Ind. v. New Albany*, 11 Ind. 139; *State v. Atkins*, 35 Ga. 315; *Miers v. Zanesville Co.*, 11 Ohio 273; *Curran v. Arkansas*, 15 How. 304; *Morrel v. Bank of Pa.*, 5 Phila. 61).

The immunity of a state does not extend to an individual to whom the state has transferred the lands, etc., which were exempted (*Penn. R. R. v. Duquesne*, 46 Pa. St. 223; *Trustees v. Chicago*, 12 Ill. 403; *New Haven v. Sheffield*, 30 Conn. 160; *Paul v. Shaw*, 2 Sulk. 167; *Colchester v. Kewney*, 4 H. & C. 445, *L. R. (1 Exch.)* 308; *Reg. v. Wallingford*, 10 Ad. & El. 259; see *All Souls v. Costar*, 3 Bos. & Pul. 635; *Todd v. London Railway*, 7 Man. & Gr. 366; *Del. Division v. McKeen*, 49 Pa. St. 424, 52 Pa. St. 117).

If the state be named, of course it is bound (*Straus v. Com.*, 1 Duv. 149; *State v. Crutcher*, 2 Swan 504, 510; *Piper v. Richardson*, 9 Metc. 155; *Soady v. Wilson*, 3 Ad. & El. 240; *Netherton v. Ward*, 3 Barn. & Ald. 21).

Trustees of Public Schools v. City of Trenton.

or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put a construction on a statute which would affect its rights. *United States v. Hoar*, 2 *Mason* 314. The statute of limitations, which most effectually puts an end to and determines the rights of private individuals, by lapse of time, will be inoperative as against the crown or the state suing for the enforcement of its rights in property, unless it be specially named therein. *Lambert v. Taylor*, 4 *B. & C.* 138; *United States v. Buford*, 3 *Pet.* 12; *United States v. Hoar*, 2 *Mason* 314; *People v. Gilbert*, 18 *Johns.* 227. A discharge under the bankrupt or insolvent laws will not release the debtor from any of his obligations for debts due to the crown or to the state, for the reason that the public is not bound by statutes of this kind, unless expressly mentioned. *Anon.*, 1 *Atk.* 262; *United States v. Nelson*, 8 *Wheat.* 253; *Glenn v. Humphreys*, 4 *Wash. C. C.* 424; *People v. Roseter*, 4 *Cow.* 143.

The rule of construction above mentioned was adopted and enforced in this state in *Den v. O'Hanlon*, *Spen.* 31, *S. C. on error*, 1 *Zab.* 582, under circumstances which give that case the force of a direct precedent on the subject now under consideration. John G. Leake died in 1827, intestate, seized of lands in the county of Bergen, and without heirs

A municipality having no other powers than those conferred by its charter or the laws of the state, can impose taxes in no other manner (*Daily v. Swope*, 47 *Miss.* 367; *Kinsey v. Pulaski Co.*, 2 *Dill.* 253, 255, *note*; *Augusta v. Nat. Bank*, 47 *Ga.* 562; *Nashville v. Bank of Tenn.*, 1 *Swan* 269; *Augusta v. Dunbar*, 50 *Ga.* 387; *Pullen v. Raleigh*, 68 *N. C.* 451). Although the imposition of or exemption from a state tax does not necessarily affect a local one (*State v. Robertson*, 4 *Zab.* 504; *Home Ins. Co. v. Augusta*, 93 *U. S.* 116; *Wiggins v. Chicago*, 68 *Ill.* 372; *Morgan v. Crez*, 46 *Vt.* 773; *Coulson v. Harris*, 43 *Miss.* 728; *Oranue R. R. v. Alexandria*, 17 *Gratt.* 176; *Gordon v. Baltimore*, 5 *Gill* 231; *Richmond v. Richmond & Danville R. R.*, 21 *Gratt.* 604; *State v. Elizabeth*, 8 *Vr.* 330; *Mayor of New York*, 11 *Johns.* 77; *Martin v. Charleston*, 13 *Rich. Eq.* 50); unless expressly so provided by statute (*C. & A. R. R. v. Hillegas*, 3 *Harr.* 11; *Gardner v. State*, 1 *Zab.* 577; *State v. Bently*, 3 *Zab.* 532; *State v. Mansfield*, 3 *Zab.* 510; *Bank v. Edwards*, 5 *Ired.* 516; *State Bank v. Charleston*, 3 *Rich.* 342; *Tax Cases*, 12 *Gill & Johns.* 117; *State v. Haight*, 5 *Vr.* 319; *Evansville v. Hall*, 14 *Ind.* 27).

Trustees of Public Schools v. City of Trenton.

capable of inheriting the same By reason of his death intestate and without heirs capable of inheriting, the lands escheated to the state. In 1832 an inquisition was taken by the state, pursuant to the act concerning escheats. *Elm. Dig.* 162. In 1834 the orphans court of the county of Bergen made an order for the sale of lands for the payment of the debts of the deceased, pursuant to several acts of the legislature passed in 1799, 1825 and 1837, which empowered the orphans court to order the sale of lands of decedents for the payment of debts. The plaintiff made title under a purchase at such sale. The question for decision was, whether the orphans court had jurisdiction to order the sale. The title of the state accrued at the death of Leake, in 1827; the sale was ordered by the orphans court, under a statute in force before the title of the state accrued; and yet, the supreme court and this court disaffirmed the title of the purchaser, for the reason that in the general words of the statute was not included the power to sell land escheated to the state, and to divest the title of the state.

Speaking of the common law rule of construction, that the sovereign power is not restrained of a previous right by the general words of a statute, Justice Carpenter, in this court, said: "It is a rule which has been adopted and

A state cannot authorize a city to assess a tax which she herself could not assess (*O'Donnell v. Bailey*, 24 Miss. 386); nor can a city exempt any property from taxation (*Mack v. Jones*, 1 Fost. 393; *Brewer Co. v. Brewer*, 62 Me. 62; *Cooley on Tax.* 152).

As to the nature of county taxes, see (*State v. St. Louis*, 34 Mo. 546; *Woodburn v. Farmers Bank*, 5 Watts & Serg. 447, 450).

Whether money paid into court is taxable, see (*Kellinger's Case*, 9 Paige 62; *People v. Lardner*, 30 Cal. 242; *Com'rs v. Clarke*, 36 Md. 206); or, in a receiver's hands, (*Hewitt v. New York & O. R. R.*, 12 Blatch. 452, 13 Blatch. 104; 2 Cent. L. J. 601; 3 Cent. L. J. 715); or, held by an assignee in bankruptcy (*Mitchell's Case*, 17 Alb. L. J. 26; *Booth's Case*, 14 Nat. Bk. Reg. 332; *County of Yuba v. Adams*, 7 Cal. 35).

In several states special statutes for the protection of school or sinking funds, including exemption from taxation, exist—see (*Lowry v. Francis*, 2 Yerg. 534; *Crum v. Cotting*, 22 Iowa 411; *Miller v. Gregg*, 26 Iowa 75; *State v. Shaw*, 28 Iowa 67; *Hamilton v. State*, 1 Ind. 128; *Tip-ton Co. v. State*, 24 Ind., 255; *Chicago v. Miller*, 80 Ill. 384).—REP.

Trustees of Public Schools v. City of Trenton.

recognized in this country as applicable to our institutions; it is a rule not founded on royal prerogative, but on principles of public policy, that the state should not suffer from the negligence of its officers and servants. * * * The reasons for applying the maxim in a representative government, where the people act only through the delegated power of their agents, is equally cogent as in a kingly government; the rule stands on the same ground of expediency and public conveniency." 1 Zab. 558.

Considerations of public policy of the greatest weight require the application of this rule of construction in the case now in hand. The moneys represented by the complainants' mortgage are not a legitimate subject of taxation by the city, for the reason that they are the property of the state, and, by implication, are excluded from the class of property over which the city's power of taxation extends. The sections of the city charter preferring its lien for taxes over prior mortgages and other encumbrances, are simply adjuncts to its powers of taxation. As statutes on the same subject, or parts of the same statute relating to one subject, they are *in pari materia*, and should receive the same construction. If the securities of the state are subject to this priority of lien, their value is liable to be destroyed by the failure of its agents, through neglect or inadvertence, to make redemption of the premises from sale and conveyance, by the payment of the taxes; and without a legislative appropriation, no funds would be provided for that purpose. It is not to be supposed that the legislature intended to make the investments of the school fund and the sinking fund precarious, by subjecting them to the liability of being swept away by the summary process of tax sales.

The mortgage to the chancellor is entitled to stand in the same position. It was executed and delivered in 1867, long before any of these taxes were assessed. It represents property which the state, in virtue of its sovereignty, has drawn into its courts, and is invested in the name of the chancellor, as its selected agency for the investment thereof.

Trustees of Public Schools v. City of Trenton.

These investments are generally made for long periods of time, and are frequently for the ultimate benefit of persons not *in esse*. It is not within the official duty of the chancellor to see that the taxes on the mortgaged premises are not permitted by the mortgagor to fall in arrear; and no officer of the state is charged with the duty of oversight over the subject. The same considerations of public policy, founded on expediency, which protect investments of the funds of the state from the hazards of the priority of tax liens, apply with equal force to these investments, and induce a similar construction of the tax laws as applicable to these securities.

The decree appealed from should be affirmed.

DIXON, J.

I concur in the opinion of the court in this cause, except so far as it accords to the "chancellor's mortgage" priority over the tax. The reason for conceding such priority to the mortgage of the school trustees is, that that is the property of the state, and the provision of the city charter constituting taxes a lien upon land superior to mortgages, does not relate to a mortgage of the state, because there are not express words or necessary implication to that effect. Indeed, it would be strange if the state should authorize its agents to impair one of its pecuniary claims in order to strengthen another no more valuable. But this reason seems to me wholly inapplicable to the "chancellor's mortgage." I can regard that only as private property. It secures a bond conditioned for the payment of the interest of \$5,413.33 to Elizabeth Howell during her life, and of that principal sum to J. L. H., C. M. H., F. H. and L. H., in equal shares, on the death of Elizabeth. No part of the value represented by the bond is now in the keeping of the chancellor or his officers, nor will it, according to the terms of the condition, ever get there. It is to pass from private hand to private hand for private use. That the chancellor is the nominal obligee is purely formal, not in the least affecting the right of property.

Trustees of Public Schools v. City of Trenton.

In *State v. Hansom*, 7 Vr. 50, the supreme court held, in the case of a bond just like this, that the payee of the interest could be legally taxed for the interest which had accrued on the bond up to the time of the assessment, a distinct recognition of the fact that such debts are private property within the purview of our tax laws.

The *Kellinger Case*, 9 Paige 61, which is the only authority cited for the notion that such property as this is not taxable, while it decides, very properly, that the court of chancery and its officers cannot be assessed for funds there deposited, clearly implies that the suitors who own those funds can be taxed therefor as for any other personal estate. Chancellor Walworth says: "If the court of chancery, or its officers, can be taxed as the trustee of the fund in the sixth ward of the city of New York, suitors residing elsewhere must either pay a double tax upon their interests in the fund, or the town or ward where such suitors reside will be deprived of the right to tax them anything on account of that portion of their personal estate. * * * If any part of the fund in court belongs to persons residing in the city of New York, *so as to render it proper that the same should be taxed in that city*, the true course is to assess the same to such owner in the ward in which he resides, as a part of his personal estate."

The doctrine that private property, in the custody or under the management or control of the courts for the benefit or protection of the owners, is, therefore, to be relieved from the burdens of government, seems to me to lead to results utterly inadmissible.

For affirmance—BEASLEY, C. J., DALRIMPLE, DEPUE, KNAPP, REED, SCULDER, WOODHULL, CLEMENT, DODD, GREEN, LATHROP—11.

For reversal—DIXON—1.

Cushing v. Blake.

WILLIAM L. CUSHING

v.

GEORGE W. BLAKE.

1. In equity, equitable estates are considered as legal estates, and are subject to the same incidents, properties and consequences as, under like circumstances, belong to similar estates at law.

2. A husband is entitled to curtesy in the wife's equitable estate of inheritance, if the requisites of such a title in legal estates existed. Actual possession of the estate, or the receipt of rents, issues and profits by her, or possession by her trustee for her benefit, is considered as such seizin of the equitable estate as is equivalent to legal seizin.

3. The husband's curtesy is one of the legal incidents of the wife's estate of inheritance, and he will not be excluded from rights in property springing from the marital relation, except by words that leave no doubt of the intention. The fact that the limitation is to the wife, for her sole and separate use during her life, will not defeat his right as tenant by the curtesy.

4. In construing the limitations of trusts, courts of equity adopt the rules of law applicable to legal estates. The rule in *Shelley's Case* is applicable to equitable as well as legal estates.

5. In some cases, and for certain purposes, a court of equity, where the trust is what is known as an executory trust, will so deal with it as to give effect to the general intent of the creator of it, without adherence to the strict legal effect of the terms in which it is expressed.

6. The distinction between executed and executory trusts depends upon the manner in which the trust is declared. When the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust. It is only where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of the trustee, that a court of equity regards the trust as an executory trust, and will direct the trust to be executed upon a construction different from that which the instrument would receive in a court of law.

7. A mere direction to the trustee to convey, will not convert a trust into an executory trust. If the trusts are fully and accurately expressed, the rights of the beneficiaries are not affected by the direction to convey; the conveyance must conform to their rights as declared, and the equitable estate immediately vests accordingly.

Cushing v. Blake.

8. In one respect there is a difference between marriage articles and a devise by will. When technical terms are used in an agreement for a settlement, in view of marriage, which, under the artificial rule in *Shelley's Case*, would create an estate in fee or in tail, the court will infer, from the nature of the agreement, that the parties contemplated provision for the issue of the marriage, which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be executed in such a manner as will prevent the destruction of the limitations over to the issue. But this doctrine is applicable only so long as the agreement for a settlement remains a matter of contract. If the parties have themselves completed the settlement by a deed complete in itself, so that it requires only to be obeyed and fulfilled by the trustee according to the provisions of the settlement, the trust will be construed in the same manner as other trusts for the same purposes.

9. D., contemplating marriage, purchased and caused to be conveyed to B. certain lands, for the benefit of his intended wife. B. executed a declaration of trust, whereby, after reciting the conveyance to him and the fact that the marriage was about to take place, he acknowledged and declared that he held the premises in trust to and for the sole use and benefit of the intended wife, separate and apart from her intended husband, before and after her intended marriage; and, on the further trust, to convey to such person or persons as she, in her life-time, by writing, or by her last will or writing in the nature thereof, should appoint, and, on failure of such appointment, to her heirs at law, to hold to them, their heirs and assigns forever. The marriage took place, and the wife died, leaving issue of the marriage.—*Held*, that the husband was entitled to curtesy in the premises so conveyed in trust.

On appeal from a decree of the chancellor, whose opinion may be found in *Cushing v. Blake*, 2 *Stew.* 399.

Mr. W. S. Whitehead, for the appellant.

Mr. F. W. Stevens, *contra*.

William Durbridge, contemplating marriage with Josephine, daughter of George W. Blake, purchased and caused to be conveyed to Blake, for her benefit, certain lands in the city of New York; part of the purchase-money was paid by Durbridge, and the balance was secured by mortgage on the

Cushing v. Blake.

property; Blake executed and delivered a declaration of trust, by which, after reciting the conveyance to him, and the fact that the marriage was about to take place, and that the conveyance of the property had been made to him in consideration of the marriage, in order that the property might be "safely and securely settled upon, and for the benefit of, and in trust for the said Josephine, separate and apart from her husband," he acknowledged and declared that he received the deed, and was nominated as grantee therein, and held and possessed the premises only in trust to and for the sole use and benefit of Josephine, separate and apart from Durbridge, before or after her intended marriage with him, and to permit her to occupy and possess the premises so far as she should desire, and as to so much thereof as she should not desire to occupy, to rent it under her direction, and to receive and pay to her, upon her separate receipt, the rents, issues and profits thereof; and on the further trust that he would, whenever thereto required by writing, under her hand, during her life-time, convey the property to such person or persons as she should appoint, and at her decease to such person as she should, by her last will, or writing in the nature thereof, have appointed, or, on failure of such will or writing, to her heirs at law, to hold to them, their heirs and assigns forever. The marriage took place; the wife died, leaving one child, the issue of the marriage, and without having disposed of the property, or any part of it, in her life-time, and without having made any will or executed any writing in the nature thereof. Her husband survives her.

After the death of the wife, Durbridge conveyed his life estate to the complainant. The bill is filed for a decree declaring that Durbridge, on the death of his wife, became entitled to an equitable estate by the curtesy in the premises.

The chancellor held that the husband was entitled to an estate by the curtesy in the premises. From that decree the defendant appealed.

Cushing v. Blake.

Mr. Wm. Silas Whitehead, for appellants.

I. It is admitted that if Mrs. Durbridge took, under the terms of the trust, an equitable estate of inheritance, in fee-simple, and if the rule in *Shelley's Case* applies, the husband is entitled to curtesy.

II. But it is insisted that the trust in this case is *executory* and not *executed*.

"There is a settled distinction between trusts executory and trusts executed. In the former something is left to be done, some conveyance thereafter to be made; and where, as in the case of marriage articles, a trust is created to be subsequently carried into execution."

4 *Kent Comm.* *219, *304, *305; 2 *Powell on Dev.* *442; *Lewin on Trusts* 45; *Wood v. Burnham*, 6 *Paige* 514; *Tallman v. Wood*, 26 *Wend.* 20; *Edmondson v. Dyson*, 2 *Kelly (Ga.)* 307; *Wiley v. Smith*, 3 *Kelly (Ga.)* 551; *Porter v. Doby*, 2 *Rich. Eq.* 49; *Saunders v. Edwards*, 2 *Jones Eq.* 134.

III. The trust in question was created under a marriage settlement.

IV. In cases of executory trusts, and of marriage settlements, it is the settled doctrine that the application of the rule in *Shelley's Case* is arrested, and courts of equity will examine into and effectuate the intention of the settler, and will construe the deed of settlement or articles in accordance with that intention, notwithstanding the rule.

(a) As to cases of devises and trust deeds.

Maddock's Ch. *449; *Roberts v. Dixwell*, 1 *Atk.* 607; *Papilion v. Voice*, 2 *P. Wms.* 471-478; 1 *White & Tudor's Lead. Cas. in Eq.* 36; *Wood v. Burnham*, 6 *Paige* 514; *Tallman v. Wood*, 26 *Wend.* 20; *Saunders v. Edwards*, 2 *Jones Eq.* 134; *Edmondson v. Dyson*, 2 *Kelly* 307; *Wiley v. Smith*, 3 *Kelly* 551; *Porter v. Doby*, 2 *Rich. Eq.* 49.

(b) As to marriage settlements.

2 *Washburn on Real Prop.* 182; 1 *White & Tudor's Lead. Cas.* 21; *Id.* 47; 2 *Story's Eq. Jur.*, § 984; *Jerrois v. Duke*

Cushing v. Blake.

of Northumberland, 1 Jac. & W. 573; *Hearle v. Greenbank*, 3 Atk. 695; *Bennett v. Davis*, 2 P. Wms. 316; *Garner v. Garner*, 1 Desauss. 437.

V. The trust in question being executory, and being, moreover, created by a marriage settlement, it is to be moulded by the court in accordance with the intention of the settler.

VI. The following are some cases in which it has been held that the husband is not entitled as tenant by the curtesy :

Where real estate is limited to the separate use of the wife, so as to leave to the husband no legal or equitable interest in the estate, he cannot be tenant by the curtesy.

Moore v. Webster, L. R. (3 Eq.) 267.

A husband is not entitled to an estate by the curtesy out of land devised to a trustee for the sole and separate use of the wife in fee-simple.

Cockran v. O'Hern, 4 W. & S. 95; *Stokes v. McKibbin*, 13 Pa. 267; *Rigler v. Cloud*, 14 Pa. St. 361; *Berry v. Williamson*, 11 B. Mon. 245-257; *Adams v. Dickson*, 23 Ga. 406; *Mason v. Deese*, 30 Ga. 308; *Hooker v. Lee*, 7 Ired. Eq. 83; *Ward v. Thompson*, 6 Gill 349; *Townsend v. Matthews*, 10 Md. 251.

Mr. Fred. W. Stevens, for respondents.

I. That the husband is entitled to curtesy in his wife's equitable estate of inheritance, is well settled (*Clancy's Rights of Married Women* *186; *Perry on Trusts*, § 324; 1 *Greenleaf's Cruise, Book I.*, *147; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyler*, 14 Sim. 125); though the rents and profits are to be paid to her separate use during the coverture (4 *Kent Comm.* *31; *Clancy's Rights of Married Women*, chap. V., *282; *Mullany v. Mullany*, 3 Gr. Ch. 16, 20; *Appleton v. Rowley*, L. R. (8 Eq.) 139).

So that the main question in this case is, whether the wife, under the above conveyance and declaration of trust, has an

Cushing v. Blake.

equitable inheritance, and this depends upon the question, whether the case in hand is to be governed by the rule in *Shelley's Case* (see *Adams v. Ross*, 1 Vr. 512); *Greenleaf's Cruise, Book IV., Deed ch. 23, *305.*

II. The rule applies as well to trusts as to legal estates (*Lord Glenarthy v. Bosville*, 1 Lead. Cas. in Eq. *19), and it would be conclusive upon the question at issue, had not a distinction been taken between its applicability to trusts *executed* and to trusts *executory*. *Id.*; 4 Kent Comm. *232; *Fearne on Rem.* *86.

It is admitted that there is a distinction between executed trusts and such as are executory; in the former case the rule applies; in the latter it does not, universally (*Lord Glenarthy v. Bosville*, 1 Lead. Cas. in Eq., *19); and in the trust in question is contained a declaration that the trustee will, on the decease of Josephine, convey, in default of appointment, to her heirs at law. Because of this agreement to convey, the trust is alleged to be executory; but it is clear, on the authorities, that a mere direction to convey, without more, will not render the trust executory, so as to take it out of the operation of the rule in *Shelley's Case*. The trust only becomes executory with this effect, where, to use the language of Lord Talbot, in the case just cited, "*something is left to be done, viz., the trusts are left to be executed in a more careful and more accurate manner.*" *Wood v. Burnham*, 6 Paige 520. The only exceptional case is *Edmondson v. Dyson*, 2 Kelley (Ga.) 307. 2 Spence Eq. Jur. *1132; *East v. Twyford*, 9 Hare *733; see, also, *Doncaster v. Doncaster*, 3 Kay & J. 26; *Herbert v. Blunden*, 1 Dr. & Wul. 78, 89; *Egerton v. Lord Brownlow*, 4 H. L. Cas. 209, 210; *Jerroise v. Duke of Northumberland*, 1 Jac. & W. 539; *Blackburn v. Stables*, 2 V. & B. 367; *Britton v. Twining*, 3 Mer. 176; *Marshall v. Bonsfield*, 2 Madd. 166.

III. Counsel, in the argument before the chancellor, cited some cases in which the husband's curtesy was excluded by express words. Of this character are *Bennet v. Davis*, 2

Cushing v. Blake.

P. Wms. 316; *Stokes v. McKibbin*, 13 *Pa. St.* 267; *Moore v. Webster*, *L. R.* (3 *Eq.*) 267. These cases have not always been followed; see *Mullany v. Mullany*, 3 *Gr. Ch.* 23; and, also, *Ege v. Medlar*, 82 *Pa. St.* 86.

DEPUE, J.

The doctrine of courts of equity is that equitable estates are considered, to all intents and purposes, as legal estates. In construing the limitations of a trust, courts of equity adopt the rules of law applicable to legal estates. The *cestui que trust* takes the same interest in duration as in a legal estate. Trust estates are subject to the same incidents, properties and consequences as, under like circumstances, belong to similar estates at law. They are alienable, devisable and descendible in the same manner. Though an equitable estate is incapable of livery of seizin, yet conveyances which operate by the statute of uses will transfer the equitable fee. Though the peculiar process of fines and recoveries is inappropriate to them, entails of equitable estates may nevertheless be destroyed by this process. The canons regulating the descent of legal estates govern the transmission of equitable estates. 2 *Spence Eq. Jur.* 876; 2 *Story Eq. Jur.* § 974; *Co. Lit.* 290b, *Butler's note XVI*; *Croxall v. Shererd*, 5 *Wall.* 268; *Mullany v. Mullany*, 3 *Gr. Ch.* 16; *Price v. Sisson*, 2 *Beas.* 168. In the note above referred to, Mr. Butler says: "The cases where the analogy" [between equitable and legal estates] "fails, are not numerous, and there is scarcely a rule of law or equity of more ancient origin, or which admits of fewer exceptions, than the rule that equity followeth the law."

A notable exception to the identity of equitable and legal estates formerly existed, in that a widow was not dowable in a trust estate. The grounds on which this exception rested are explained by Lord Redesdale, in *D'Arcy v. Blake*, 2 *Sch. & Lef.* 387. This anomaly was removed in this state by the statute of 1799 (*Pat.* 343), and in England by act of

Cushing v. Blake.

parliament, 3 & 4 Wm. IV, c. 105 (*Smith v. Spencer*, 2 Jur. (N. S.) 778, *S. C. on appeal*, 3 *Id.* 193); and, both in England and in this state, a widow is now entitled to dower in an equitable estate of her husband, the same as in his legal estates.

With regard to curtesy, an equitable estate of inheritance in the wife always conferred on the husband an estate as tenant by the curtesy, if the requisites of such a title in a legal estate existed. Actual possession of the estate, or the receipt of the rents, issues and profits by the wife, or possession by her trustee for her benefit, is considered as such seizin of the equitable estate as is equivalent to legal seizin. *Lewin on Trusts* 622; *Watts v. Ball*, 1 P. Wms. 108; *Parker v. Carter*, 4 Hare 400. That the limitation of the equitable estate is to the sole and separate use of the wife during her life, will not defeat the husband's right as tenant by the curtesy. In *Roberts v. Dixwell*, 1 Atk. 607, it was said by Lord Hardwicke that, on a devise to a wife for her separate use, the husband is not barred of his tenancy by the curtesy. In a later case the same chancellor held that the husband was not entitled to curtesy in lands devised to the wife for her sole and separate use during her life, to be at her disposal, and not subject to the debts, power or control of her husband, with a power in her to dispose of the whole inheritance by deed or will, for the reason that the husband, being excluded from the possession and profits, had no seizin of the inheritance during coverture. *Hearle v. Greenbank*, 3 Atk. 695, *Hearle v. Greenbank*, though followed by V. C. Stuart, in *Moore v. Webster*, L. R. (3 Eq.) 267, has been overruled both in England and in this state. *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Appleby v. Rowley*, L. R. (8 Eq.) 137; *Mullany v. Mullany*, 3 Gr. Ch. 16. Upon principle, as well as by the weight of authority, it may be regarded as settled that the husband's estate by the curtesy will arise in him at the death of his wife, though the limitation to her during her life is for her sole and

Cushing v. Blake.

separate use, exclusive of any interest or control on the part of the husband. The limitation for her separate use terminates at her death. Seizin by the husband during coverture is not necessary to his curtesy. Possession in conformity with the equitable interests of the *cestui que trust*, whether by the *cestui que trust*, or by the trustee, is all that is essential to support the title of the husband as tenant by the curtesy. *Parker v. Carter*, 4 *Hare* 400. The husband will be entitled as tenant by the curtesy to the interest, during his life, of money directed to be invested in the purchase of land to be settled on a married woman, in fee or in tail, though no rent or interest was paid during the coverture. *Sweetapple v. Bindon*, 2 *Vern.* 536; *Otway v. Hudson*, *Id.* 583; *Dodson v. Hay*, 3 *Bro. C. C.* 404; *Lewin on Trusts* 622. Curtesy is a legal incident of the wife's estate of inheritance, and is a right favored in the law. A husband will not be excluded from rights in the property of the wife springing from the marital relation, except by words that leave no doubt of the intention to do so. *Massey v. Parker*, 2 *Myl. & K.* 174, 181. The married woman's act most effectually makes the estate of the wife her separate estate, and yet it has not abolished the husband's curtesy after her death. *Johnson v. Cummings*, 1 *C. E. Gr.* 97; *Porch v. Fries*, 3 *Id.* 204.

In the present case the limitation over after the death of the wife, in default of an appointment by her, is to her heirs at law, to hold to them, their heirs and assigns, forever. Under the rule in *Shelley's Case*, such a limitation gives to the wife an estate in fee-simple in which the husband, having issue by her, would be entitled to curtesy, if her estate was a legal estate. The rule in *Shelley's Case* is applicable to equitable as well as legal estates. *Croxall v. Shererd*, 5 *Wall.* 268; and in no case whatever of a trust executed, have the words heirs, or heirs of the body, following a limitation to the ancestor for life, received a construction in equitable estates different from that which the same limitations would receive in legal estates. 1 *Preston on Est.* 386.

Cushing v. Blake.

The counsel who argued this case on behalf of the defendant has, therefore, placed his denial of the right of the husband to curtesy on the ground that the trust in this instance was an executory trust. In some cases, and for certain purposes, a court of equity, where the trust is what is known as an executory trust, will so deal with it as to give effect to the general intent of the creator of it, without adherence to the strict legal effect of the terms in which it is expressed.

In one sense every trust is executory. At common law every use was a trust. But by the statute of uses, certain uses were converted into legal estates, and, strictly speaking, every trust executed is a legal estate. In this sense the trust must be executory to bring the case at all within the jurisdiction of chancery. *Bagshaw v. Spencer*, 1 Ves. 142, 152. But this is not the sense in which the term executory trust is used as applicable to that class of cases in which equity will deal with the subject, without regard to the legal signification of the terms in which the trust is declared.

The earliest reported case in which the distinction is taken between executed and executory trusts, as administered in the court of chancery, is *Leonard v. Countess of Sussex*, 2 Vern. 526. This difference was first fully explained by Lord Chancellor Cowper, in *Earl of Stamford v. Hobart*, 1 Bro. P. C. 288; and, notwithstanding the doubt expressed by Lord Hardwicke in *Bagshaw v. Spencer*, this distinction is completely settled in the English courts. The leading cases on the subject are *Wright v. Pearson*, 1 Eden 119; *Austin v. Taylor*, Id. 361; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 559; *Boswell v. Dillon*, Drury 291, and in *Rochfort v. Fitzmaurice*, 2 Dru. & War. 1, in which Lord Chancellor Sugden discusses the earlier cases on the subject. From an examination of these cases, and many others which might be cited, the distinction will be found to rest on the manner in which the trust is declared.

Where the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust. In such

Cushing v. Blake.

a case, equity will not interfere and give effect to it on a construction different from what it would receive in a court of law. It is only where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of trustees, that a court of equity regards the trust as an executory trust, and will assume jurisdiction to direct the trust to be executed upon a construction different from that which the instrument creating it would receive in a court of law. These principles are so clearly and fully stated by Lord Chancellor Sugden, in *Boswell v. Dillon*, that the following quotation from his opinion may profitably be made: "By the term an executory trust, when used in its proper sense, we mean a trust in which some further act is directed to be done. Executory trusts in this way may be divided into two classes: one, in which, though something is required to be done (for example, a settlement to be executed), yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made, and the court has nothing to do but to follow out and execute the intentions of the party, as appearing in the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending upon the same words. The other species of executory trusts is, where the testator, directing a further act, has imperfectly stated what is to be done. In such cases, the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves."

This distinction between executed and executory trusts has been adopted by the courts of this state. *Mullany v. Mullany*, 3 Gr. Ch. 16; *Price v. Sisson*, 2 Beas. 168; *S. C. on appeal, sub nom. Weehawken Ferry Co. v. Sisson*, 2 C. E. Gr. 476. In the case last cited, Chief Justice Beasley, delivering the opinion of this court, said: "A critical examination of the decisions will show that, to be executory,

Cushing v. Blake.

so as to fall within the relaxation of the ordinary rules of construction, the limitations of the equitable interest must be incomplete, and something must be left to the trustee to define and settle."

It is obvious, from what has already been said, that a mere direction to the trustee to convey, in accordance with trusts which have been fully defined, will not convert a trust into an executory trust in the sense which will sustain the views of the defendant's counsel. It is an essential part of every trust that the trustee shall convey the estate, when his duties require it, whether he has been expressly directed to do so or not. *Bagshaw v. Spencer*, 1 Ves. 152. "All trusts," says Lord St. Leonards, "are in a sense executory, because a trust cannot be executed except by conveyance, and, therefore, there is always something to be done; but this is not the sense which a court of equity puts upon the term executory trusts." *Egerton v. Earl Brownlow*, 4 H. of L. Cas. 1210.

In *Price v. Sisson*, *supra*, the deed creating the trust contained a direction to the trustee to convey, and yet the chancellor, and this court, regarded it as creating an executed trust, and subject to have its limitations construed by rules applicable to legal estates. The cases to the contrary are those in which the intent is expressed in general language, and the trusts, therefore, are imperfectly declared, so that it is apparent, on the face of the instrument, that it was contemplated that they should be executed by the trustees in a more accurate manner, to give effect to the intent expressed (*Lord Glenorchy v. Bosville*, Cas. temp. Talb. 3; *Leonard v. Countess of Sussex*, 2 Vern. 526; *Rockfort v. Fitzmaurice*, 2 Dru. & War. 1); or where some of the limitations are illegal, and the court is called upon to carry into effect the trusts declared, so far as the rules of law will permit. *Earl of Stamford v. Hobart*, 1 Bro. P. C. 288; *Humberston v. Humberston*, 2 Vern. 737. A conveyance by the trustee may be necessary for the purpose of investing the *cestuis que trust* with the legal estate; but if the trusts are fully and

Cushing v. Blake.

accurately expressed, the rights of the beneficiaries are not affected by the direction to convey; the conveyance must conform to their rights as declared, and the equitable estate immediately vests accordingly. *Stanley v. Stanley*, 16 Ves. 491; *Phipps v. Ackers*, 9 Cl. & Fin. 583, 594, 599, 601, 604; *Bowan v. Chase*, 94 U. S. 818.

It was further contended, that this case is excepted out of these rules for the construction of trusts in a court of equity, by the fact that the trust in question was in the nature of a marriage settlement.

There is a difference, in one respect, between marriage articles and a devise by will. Under the artificial rule in *Shelley's Case*, a gift to the ancestor for life, with a limitation over to heirs, or heirs of the body, creates in him an estate in fee or in tail, and the limitation over is capable of destruction by him, by conveyance or devise if the estate be a fee-simple, or by fine and common recovery if it be a fee-tail. When these technical terms are used in an agreement for a settlement, in view of marriage, the court will infer, from the nature of the agreement, that the parties contemplated provisions for the issue of the marriage, which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be made in such a manner as will prevent the destruction of the limitations over to issue. *Blackburn v. Stables*, 2 V. & B. 367; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 559; *Rockfort v. Fitzmaurice*, 2 Dru. & War. 18; *Sackville v. Viscount Holmesdale*, L. R. (4 H. of L.) 543. But this doctrine of the court is applicable only so long as the agreement for a settlement remains a matter of contract. If the parties have themselves completed the settlement by a deed, complete in itself, and perfect, so that it requires only to be obeyed and fulfilled by the trustees, according to the provisions of the settlement, the trust will be construed in the same manner as similar trusts created for other purposes. *Neves v. Scott*, 9 How. 196; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Carroll v. Renich*, 7 Sm. & M. 798. A settlement intended as a final

Gardner v. Butler.

and complete act, and not mere heads or minutes from which to prepare a settlement at a future time, will be construed according to strict legal rules, though the subject of the settlement be equitable property. *Atherly on Marriage Settlements* 151; 2 *Story Eq. Jur.* § 983.

In this case the trusts upon which the trustee was required to hold the estate, were definitely and perfectly expressed in the declaration of trust accompanying the conveyance, and he had no duties to perform but to hold and convey accordingly. The trusts are such as are regarded as executed trusts in a court of equity, and the estates created by the trust, and all the incidents connected therewith, are the same as would arise in law upon a legal conveyance expressed in the same language. Among these incidents is the right of the husband to his curtesy estate. *Morgan v. Morgan*, and *Follet v. Tyrer*, *supra*, are directly in point. These cases were decided upon conveyances to trustees by way of marriage settlements, in trust for the separate use of the wife during life, with power to appoint by deed or will, and, in default of appointment, in trust for her right heirs. In both cases the husband was adjudged his tenancy by the curtesy. In *Cunningham v. Moody*, 1 *Ves.* 174, the husband was allowed curtesy in money, agreed in marriage articles to be laid out in the purchase of lands, to be settled on the wife in tail.

The chancellor's decree should be affirmed.

Decree unanimously affirmed.

JOHN R. GARDNER and others, appellants,
and

HENRY V. BUTLER and others, respondents.

1. A director of a corporation cannot make with himself, or for his own benefit, a contract which will bind the company. The contract may be repudiated by the company, at the instance of a stockholder.

Gardner v. Butler.

2. If directors are employed in the business of the company, and agree to pay themselves a stipulated sum, the agreement is void, and no recovery can be based upon such contract, but for such services as they render they can recover upon the *quantum meruit*.

Mr. George De Forest Lord, of New York city, and *Mr. Cortlandt Parker*, for appellants.

Mr. T. N. McCarter and *Mr. F. T. Frelinghuysen*, for respondents.

On appeal from a decree of the chancellor, founded on the following opinion :

THE CHANCELLOR.

It appears, from the pleadings and evidence in the cause, that for many years previous to the 31st of August, 1852, Henry V. Butler, of Paterson, and Robert L. Taylor, of the city of New York, his brother-in-law, had been in business together in the manufacture and sale of paper, under the firm of H. V. Butler & Co. They entered into articles of copartnership on or about the day above mentioned, by which, after reciting their copartnership together up to that time, they entered into copartnership with each other in the same business, and under the same firm, for five years from the 1st of July, 1852. The articles provided, among other things, that they should be equally interested in the profits and losses, and that Butler should have the general management, direction and control of the business, subject, at all times, to the superintendence and inspection of Taylor, who might, at any time, at his option, exercise joint power in relation to the business, and that during all the time that Butler should have and take the management and control, he was to be entitled to and to receive a salary of \$5,000 per annum, payable quarter-yearly, which should be charged to and borne by the copartnership; and he was thereby bound to devote his whole time and attention, and

Gardner v. Butler.

give his entire exertions to the advancement of the business. The business was carried on under these articles until the 1st of June, 1858, when the parties entered into a new agreement, with similar provisions, for a continuance of the copartnership for five years from that time. In 1862 they obtained an act of incorporation from the legislature of this state, by which they and the survivor of them, and their or his associates, their successors and assigns, were constituted a body politic and corporate, by the name of "The Ivanhoe Manufacturing Company," to carry on the same business. By the act it was provided that the capital stock should be \$450,000, with liberty to increase it to \$600,000, the shares to be \$100 each. The company was not organized under this act until after a supplement had been passed, reducing the amount of the capital stock to \$300,000, with liberty to increase it to \$600,000. The company was organized in March, 1866. The supplement was passed in February of that year. By agreement between Butler and Taylor, the former was entitled to subscribe for, and hold twenty shares of the stock of the company more than the latter. It was intended by both thus to give Butler & Co. the control of the management of the company. He subscribed for fifteen hundred and five shares, Taylor for fourteen hundred and ninety shares, Aaron S. Pennington and E. Boudinot Colt for two shares each, and Andrew Derrom for one share. The five shares subscribed for by Messrs. Pennington, Colt and Derrom were paid for by Mr. Butler. Those gentlemen, with Messrs. Butler and Taylor, were named in the act as the first directors of the company. On the organization of the company, at the first meeting of the board of directors, Mr. Henry V. Butler was elected president. The powers of the president were then defined by resolution to be—to manage and conduct all the manufacturing, mercantile and other business of the corporation, as in his judgment should appear to be for the best interest of the stockholders, and to appoint all such superintendents, managers and employes as he might deem proper, and at

Gardner v. Butler.

such salaries as he might deem proper, for conducting the business. On the 12th of July, 1867, the company issued one thousand additional shares of the capital stock, of which Butler and Taylor each took one-half. From the time of the organization of the company the business of buying material for manufacturing paper for its use, and selling its manufactured paper, was transacted by Henry V. Butler. It appears that Taylor never took any active part in the business, either before or after the incorporation. For all his services to the company, Mr. Butler, up to the time of Mr. Taylor's failure in business, drew (but without special authority to do so), as president, the same compensation, \$5,000, which he had received from the firm of H. V. Butler & Co. On or about the 24th of October, 1867, Mr. Taylor failed in business, and on that day he made an assignment of all his property for the equal benefit of his creditors, accordingly, to the complainants. At a meeting of the board of directors of the company, held on the 23d of January, 1868, Mr. Butler stated that he had taken his son, Henry V. Butler, Jr., into copartnership with him in the paper commission business, in the city of New York, under the firm of H. V. Butler & Son, and proposed thereafter to transact the business of the company for such commissions as might be deemed fair and just; that he had consulted with gentlemen of experience in the city of New York, and in accordance with their views, proposed to make all the purchases, disbursements and sales for the company, for a commission of six per cent. on the gross amount of sales, the arrangement to begin on the 1st of February then next, and to continue for three years. The proposition was then accepted by a unanimous vote of the board. At a meeting of the board held on the 25th of May, 1868, it was resolved that from and after the 1st day of January, 1868, the salary of the president should be at the rate of \$6,000 a year, and that the charge of \$5,000 a year previous to that time be approved. Under the arrangement made at the meeting of January 23d, 1868, the firm of H. V. Butler & Son purchased

Gardner v. Butler.

the materials and made the disbursements and sales up to the 1st of April, 1871, receiving therefor the stipulated commission of six per cent. on the amount of the gross sales. On the 29th of March, 1871, at a meeting of the board of directors then held, Mr. Butler, the president, communicated to the board, that a new firm had been formed (the firm of H. V. Butler & Son having been dissolved) for the transaction of the paper commission business in New York, under the name of H. V. Butler, Jr. & Co., and that that firm had submitted a proposition to make all the purchases, disbursements and sales for the company at a commission of six per cent. on the gross amount of the sales only. That proposition was then accepted and an arrangement made under it for one year. The firm of H. V. Butler, Jr. & Co. was composed of Henry V. Butler, Jr. & A. Gibbs Campbell, as general partners, and Henry V. Butler, Sr. was special partner therein. All of them were directors of the company, and the resolution was carried by their votes. Indeed, but one other director was present, E. Boudinot Colt. The bill in this cause was filed on the 20th of May, 1871. It prays that the arrangement for the payment of salaries to Henry V. Butler as president, and to Henry V. Butler, Jr., as superintendent of machinery of the company (he received \$1,500 a year for that service), and the arrangements whereby the commissions were paid, may be set aside as fraudulent as against the complainants; that an account may be taken of the transactions of the company, and especially of the money paid for the salaries and commissions; that the defendant may be restrained from paying those salaries or commissions to Henry V. Butler or Henry V. Butler, Jr., or to any one else for their use or otherwise, and from making any contract for the sale of goods or purchase of materials on commission, and that the complainants, as assignees of Taylor, may have the benefit of the account, and may receive whatever is due them as stockholders. By an amendment to the bill, a prayer for a

Gardner v. Butler.

receiver, on the ground of the insolvency of the company, was added.

The defendants have all answered. Since the filing of the bill, Henry V. Butler has died.

That Henry V. Butler and Robert L. Taylor were copartners together in the paper business for many years; that the former had the entire management of the business, the latter giving to it, practically, no attention; that the two were the owners of all the stock of the corporation which succeeded the copartnership, and that it was agreed between them that in the corporation the former should have a majority of the stock to give him the control of its management, there is no question. After the organization of the company, and up to the time of Mr. Taylor's failure in business, and his consequent assignment of his property for the benefit of his creditors, Mr. Butler seems to have continued to superintend the business and to negotiate and conduct the sales and purchases therein, at the same compensation which he received for the same or like services under the copartnership. After the failure of Mr. Taylor he appears to have been unwilling to give his services to the business at the same rate of compensation as before, or rather, he seems to have been unwilling to render the same amount of service for the compensation which he received. His reason for it appears to have been that while he was willing to give to Taylor the benefit of the long-existing arrangement between them, he was not willing to continue it for the benefit of the creditors of the latter. It is insisted on the part of the complainants, that the express understanding and agreement between Butler and Taylor, on the exchange of the form of the business from that of a copartnership to the form of a corporation, was that they should continue to be equal in their participation in the benefits of the business. The proof of that agreement or understanding rests wholly on the testimony of Mr. Taylor, and it appears from his testimony that his memory had, when he testified, become so enfeebled by age as to be unreliable;

Gardner v. Butler.

for, though the arrangement by which Mr. Butler received \$5,000 a year for managing the business of the copartnership had existed, not only in their written articles of copartnership, but practically also from the 1st of August, 1852, to the time of the organization of the company, in 1866, Mr. Butler having, during all that period, had the management of the business and received that compensation for it under the agreement, Mr. Taylor appears to have wholly forgotten it. But Mr. Butler did, in fact, so transact the business after the organization of the company and give Mr. Taylor the benefit of his services in so doing in like manner as he had done under the copartnership, so long as it benefited Mr. Taylor personally; that is, until the latter failed in business and made an assignment for the benefit of his creditors. Indeed, it was not until January 23d, 1868, three months after the making of the assignment, that he made the arrangement by which he was to receive more compensation for his services as president, and other services previously rendered by him without special compensation, were to be rendered by himself and others as a mercantile firm, for proper remuneration. During almost all the time that he himself rendered those services to the company, he and Taylor were the only persons interested in the company. They, together, owned all the capital stock.

Nor was he bound to render those services, by the obligations of his office of president. He was, indeed, as president, authorized to manage and conduct all the manufacturing, mercantile and other business of the corporation, and to that end was empowered to appoint such superintendents, managers and employes as he should think fit, and give to them such compensation as he might deem proper, but he was not thereby bound to undertake the sale of its goods or the purchase of its materials, to render to the company, in consideration of his salary of \$5,000 or \$6,000 a year, not only his services as president in the general oversight of its affairs, but also services in the sale of its goods and the purchase of materials for its manufactures, which

Gardner v. Butler.

are sworn to have been worth, if performed by strangers, five times that amount. And though he had for years rendered those services, he might lawfully at any time have ceased from rendering them, if he saw fit, and have confined himself to what were strictly the duties of his office. Had the board, when he declined to buy and sell for the company without special compensation therefor, made the contracts which are now complained of, with a stranger, undoubtedly no question would have been made with regard to them.

But it is urged by the complainants that the resolutions under which the commissions were paid, were themselves entirely illegal; that, as was the fact, those who voted upon them were all either interested in the arrangement or else were mere representatives of those who were interested therein, and that, therefore, the principle enunciated in *Stewart v. Lehigh Valley R. R. Co.*, 9 Vr. 505, is applicable. It was held in that case that an express contract between the director of a corporation and his company, though not void, is voidable at the option of the *cestui que trust*, if exercised within a reasonable time, and that no consideration of its apparent or intrinsic fairness will induce a court of law or equity to enforce it against the resisting *cestui que trust*. This, however, is not a suit brought to enforce a contract made by a director with his company; nor is it brought by the company against the director; but it is a suit brought by stockholders of the company to compel an account by a director of the moneys received by him for valuable services outside of his duties as director, rendered by him to the company, and to restrain the company from paying him for other like services. It is proved, beyond all controversy, that the money received by H. V. Butler & Son and H. V. Butler, Jr. & Co., for the services rendered by them to the company, was not only not unreasonably large compensation therefor, but was less than the usual rates for such services. Witnesses, whose experience in the business enables them to speak intelligently on the subject, and entitles their testimony to weight, testify without exception that the price

Gardner v. Butler.

received by those firms for the services rendered by them to the company was less than would have been required by strangers therefor. It also appears, by the testimony, that like arrangements made by paper manufacturing companies with their directors are by no means unusual. He who would have equity must do equity. If the contracts made with those firms are to be avoided, it must be on terms that they shall be allowed reasonable compensation for the services rendered by them. But they have, under the contract, received no more than that. What, then, remains to be said?

But there is another consideration of importance upon this point. The complainants were the assignees of Taylor, and were, therefore, the owners of his stock three months before the first of those contracts was made. They had, at all times after that contract was made, an opportunity to test its validity. The courts were open to them, and yet it appears that they made no objections to it while it continued; and it was not until after it had expired, and the firm with which it was made had gone out of existence, and another firm had taken its place and entered into an agreement for the same services with the company, that they came into court for relief. There was no concealment, nor any attempt at concealment. The evidence is that the arrangements appeared on the minutes of the board of directors. There is no complaint that the minutes were not accessible or ever withheld. On the contrary, Mr. Ramage swears that Mr. Sherman, one of the complainants, was present at the stockholders' meeting, in May, 1868; that the book of minutes was there; that Mr. Henry V. Butler examined it then, and that Mr. Sherman sat beside him at the time; and he says his recollection is, that Mr. Sherman had the book, but he is not positive as to this. He further says that the minute-book lay on the desk during the progress of the meeting. The complainants do not allege that they were ignorant of the existence of the resolution of January, 1868, or of that of 1871, or of any of the

Gardner v. Butler.

material facts or circumstances in respect to which they ask relief at the hands of this court. The board of directors had power over the subject of those resolutions. By the sixth section of the charter it was provided that a majority of the directors for the time being, should form a board for transacting the business of the corporation, and should have power to ordain, establish and put in execution such by-laws, ordinances and regulations as they should deem necessary and convenient for the government, management and disposition of the stock, effects and concerns of the corporation. The president had power to appoint Henry V. Butler, Jr., superintendent of machinery, and to fix his compensation. The board had power to fix the salary of the president. There appears to be no ground of complaint in reference to the salaries, and the objections made in the bill on that subject are not pressed. A corporation may employ a member of its board of directors to transact business for it, for just compensation. There is nothing which forbids either the members or directors of a corporation to make contracts with it, like any other individual, and when the contract is made, the member or director stands, as to the contract, in the relation of a stranger to the corporation. *Stratton v. Allen*, 1 C. E. Gr. 229, 232; *Barnes v. Trenton Gas Light Co.*, 12 C. E. Gr. 33. Where valuable services have been rendered to the corporation by a member of its board, there appears to be no good reason in equity why he should not receive just compensation for them. And it follows that, if he has rendered the services and has received only just compensation therefor, there is no good reason in equity why he should be compelled to return it to the treasurer of the company. The language of Judge Strong (whose views and conclusions were approved by the supreme court of Pennsylvania), in *Ashhurst's appeal*, 60 Pa. St. 290, 314, is pertinent: "I come, then, to consider the facts that the purchasers were the same persons as those who, as directors, sold, and, as stockholders, authorized the sale. It is often said, and

Gardner v. Butler.

truly, that the same persons cannot be both buyers and sellers in one transaction. They were not, strictly, in this. All the purchasers were not directors, who made the sale. But I make no account of that. Still, why may not directors of a corporation sell to themselves? Each director has an interest distinct and antagonistic to his interest as a mere man. There is identity of person, but not of interest. There must be many things which directors can do for their individual benefit which are binding upon the corporation of which they are directors. If they have advanced money, I cannot doubt they may pay themselves with corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity. And, though ordinarily the law frowns upon contracts made by them in their representative character with themselves as private persons, such contracts are not necessarily void. They are carefully watched, and their fairness must be shown." The view expressed in the opinion in *Stewart v. Lehigh Valley R. R.*, 9 Vr. 505, 522, is not, at least so far as the legal character of the contract is concerned, in conflict with the language above quoted, for it is there said that "the true legal rule is, that such a contract is not void, but voidable; to be avoided at the option of the *cestui que trust*, exercised within a reasonable time." Nor is it, I think, in contravention of the views of the court in that case, to hold that their language in regard to the avoidance of the contract, was designed merely to express the general rule, and that the rule admits of qualifications, in equity at least. When the *cestui que trust* comes into equity to avoid the contract, even, it is reasonable that he should be required to show, as a ground for the action of the court, something more adverse to the contract than the mere fact that it was made with a director; for if it shall, as in the case in hand, appear, not only to be fair and just, but actually more advantageous to the company than any which could be made with a stranger, why should it be set aside to the detriment of the company?

Gardner v. Butler.

In *Chandler v. Monmouth Bank*, 1 Gr. 255, it was held that a provision in the charter of a bank that no director should be entitled to any emolument unless the same should have been allowed by the stockholders at a general meeting, was intended to prevent the directors from taking compensation for the performance of their appropriate duties, and that sound construction did not require the exclusion of the individuals of the board from just compensation for services of a different character, because they were rendered while they were directors.

If the president of the Ivanhoe Manufacturing Company was not bound to make the sales and purchases, and the contracts with H. V. Butler & Son and with H. V. Butler, Jr. & Co., were reasonable, then the fact that the company has paid no dividend is of no importance in connection with the question under consideration. That fact is accounted for, partly, at least, by the depression in business, and it may well be that the difference between the results of the copartnership business of H. V. Butler & Co., and the results of the transaction of the same business by the Ivanhoe Manufacturing Company, is, to a considerable degree, attributable to the fact that there was less capital employed in the latter than in the former. It appears that, out of the surplus assets of the copartnership, after the organization of the company, Mr. Taylor and his assignee received \$166,000. And it also appears that the firm lent the company \$75,000, which were repaid. And here it may be remarked that the allegation in the bill that the \$150,000 lent by Taylor to the copartnership has never been repaid, is not only denied by the answer, but is fully disproved by the evidence. Though the company appears to have been transacting its business at a loss, it does not appear to be insolvent.

The prayer for an account was based on the claim that the salaries and commissions in question should be accounted for and repaid. There does not appear to have been any refusal to account for the transactions of the com-

Gardner v. Butler.

pany at any time, and, except in connection with the salaries and commissions, there was no ground for praying an account. That ground having failed, there will be no decree for an account.

The bill will be dismissed, with costs.

Mr. Geo. De Forest Lord, for appellants.

I. The organization of the Ivanhoe Manufacturing Company merely provided a different form and mode of holding the property and conducting the business of the pre-existing firm of H. V. Butler & Co.; and although it, in some respects, changed the relation of the parties to the *public*, it did not (and was not intended to) change their relations *towards each other*; so that, as between Robert L. Taylor and Henry V. Butler, the copartnership, in all its essential features and characteristics, continued *after* the formation of the company the same as it had done *before*.

Smith v. Jackson, 2 *Edw. Ch.* 28; *Delmonico v. Guillaume*, 2 *Sandf. Ch.* 366; *Hiscock v. Phelps*, 49 *N. Y.* 97.

II. This case being, therefore, at least one of a *quasi*-copartnership, though in the *form* of a corporation—if it is to be determined upon principles applicable to a continued copartnership, then there is no justification whatever for the commissions paid either to H. V. Butler & Son, or to H. V. Butler & Co., and they should be disallowed and the money refunded.

Whittle v. McFarland, 1 *Kn.* 311.

III. Even if the theory of a continuation of *quasi*-copartnership relations between Butler and Taylor after the organization of the company, were abandoned, and the acts of the parties were considered only upon principles applicable to corporate management, the successive agreements for commissions to be paid, first, to H. V. Butler & Son, and afterwards, to H. V. Butler, Jr. & Co., were invalid, and all payments made under them should be refunded.

Gardner v. Butler.

Butts v. Wood, 38 *Barb.* 181, 37 *N. Y.* 317; *ex parte Bennett*, 18 *Beav.* 339; *York and Midland R. Co. v. Hudson*, 16 *Beav.* 485; *Mayer v. Galluchett*, 6 *Rich. Eq.* 2; *Toold v. Wilson*, 9 *Beav.* 486; *Christopher v. White*, 10 *Beav.* 523; *Stewart v. Lehigh Val. R. R.*, 9 *Vr.* 505.

IV. The defendants cannot shield themselves by assimilating their case to those of officers who receive salaries from companies of which they are also directors, and who act as agents for such companies upon terms of compensation.

Wherever such contracts have been upheld, it will appear that the authority to make them comes from the action of the *stockholders alone*—not from the directors; and the more recent authorities hold, that such agreements with individual directors cannot be sustained, even where they are made with an independent board, unless fully submitted to and ratified by the stockholders collectively.

Gt. Luxembourg Railway Co. v. Magnay, 25 *Beav.* 590; *Evants v. Coventry*, 8 *DeG. M. & G.* 835, 844; *Lindley on Partn.* (3 ed.) 570, 796; *Dunston v. Imperial Gas Co.*, 3 *B. & A.* 125.

Mr. Thos. N. McCarter, for respondents.

I. No relief can be founded on the allegation of the bill that the corporation was a mere change in form, and that, as between Butler and Taylor, their relations were still that of *partners*; and that the rights and obligations of partners, *inter sese*, still continued, notwithstanding the change; that such was the intention of the parties, and the court will give effect to it.

Ang. & Ames on Corp. § 499.

II. What rights has he as a stockholder in regard to salaries and commissions?

Stewart v. Lehigh Valley R. R. Co., 9 *Vr.* 522.

Gardner v. Butler.

III. But, if illegal, what is complainant's remedy?

He is in a court of equity; he must do equity; he cannot claim the benefit of the services rendered under this employment, without allowing fair compensation.

Mulford v. Minch, 3 *Stock*. 16; *Huston v. Cassidy*, 2 *Beas.* 228; *Smith v. Drake*, 8 *C. E. Gr.* 302; *Beeson v. Beeson*, 9 *Pa. St.* 286, and cases there cited; *ex parte Hughes*, 6 *Ves.* 617; *ex parte Bennet*, 10 *Ves.* 381; *Rogers v. Rogers*, *Hopk. Ch.* 525; *Davoue v. Fanning*, 2 *Johns. Ch.* 252.

See the subject discussed in 1 *White & Tudor's Lead. Cas.*, *Fox v. Mackreth*, (4 *Am.*, from 4 *London ed.* 172-3) 234, *Am. Notes* 259.

IV. But in any such case the *cestui que trust* may ratify the act and make it valid.

V. Sherman acquiesced.

By this it appears that, with the record before him disclosing these prior transactions, he voted to put in the same board; he has not denied it.

VI. The arrangement was made in good faith, and with the advice of counsel.

VII. The arrangement was perfectly fair.

It has been shown by all the evidence, that the commission allowed in this case is less than the current rate.

VAN SYCKEL, J.

By four successive agreements, the first dated May 1st, 1836, and the last dated June 1st, 1858, Henry V. Butler and Robert L. Taylor were engaged as partners in the manufacture and sale of paper. The manufacturing was carried on at mills in Paterson, in this state, and the buying and selling at the city of New York.

Taylor had married Butler's sister, and had confidence in his integrity and skill in the business, and he agreed to furnish the requisite capital, leaving to Butler the management and charge of the business, with the stipulation that they

Gardner v. Butler.

were to share equally in the profits and losses of the undertaking.

By the third and fourth agreements, Butler was to have a salary of \$5,000, as general manager, and one-half the profits. The business was conducted under these articles of copartnership until March 31st, 1866, when they organized as a body corporate, by the name of "The Ivanhoe Manufacturing Company," to carry on the same business, under an act of incorporation of this state. The organization was effected with a capital stock of \$300,000, in shares of \$100 each. By an arrangement between the parties, Butler subscribed for fifteen hundred and five shares, by which he secured control of the management of the company; Taylor subscribed for fourteen hundred and ninety shares, Aaron S. Pennington and E. Boudinot Colt for two shares each, and Andrew Derrom for one share. The five last-mentioned shares were paid for by Butler. These five gentlemen were named in the legislative act as the first directors of the company. On its organization, at the first meeting of the board of directors, Butler was elected president, his powers, as then defined by resolution, being, "to manage and conduct all the manufacturing, mercantile and other business of the corporation, as in his judgment should appear to be for the best interest of the stockholders, and to appoint all such superintendents, managers and employes as he might deem proper, and at such salaries as he might deem proper for conducting the business."

The company issued one thousand additional shares of capital stock in 1867, of which Butler and Taylor each took one-half. Taylor took no active part in the business of the company. Its affairs were managed by Butler, who purchased the necessary materials and sold its manufactured paper.

On the 24th of October, 1867, Taylor failed in business, and on that day made an assignment of all his property for the equal benefit of his creditors, to the complainants. Up to that date, Butler, for all his services to the company, drew

Gardner v. Butler.

as president (but without special authority to do so), an annual salary of \$5,000, the same compensation which he had received from the firm of H. V. Butler & Co. After the failure of Taylor, Butler entered into the paper commission business in the city of New York, with his son, Henry V. Butler, Jr., under the name of H. V. Butler & Son.

On the 23d of January, 1868, the board of directors (of which Butler and his son were members) agreed to pay the firm of H. V. Butler & Son a commission of six per cent. on the gross amount of sales, for selling the paper manufactured by the company. On the 25th of May following, the salary of Butler was increased to \$6,000, and on the 29th day of March, 1871 (the firm of H. V. Butler & Son having dissolved, and the new firm of H. V. Butler, Jr. & Co. formed, consisting of H. V. Butler, Jr. and one Campbell, as general partners, and H. V. Butler, Sr. as special partner), an agreement was made by the directors of the company with H. V. Butler, Jr. & Co., that they should make all the purchases, disbursements and sales for the company for a commission of six per cent. on the gross amount of the sales only. All the members of this copartnership were directors of the company, and the resolution authorizing the contract was passed by their votes.

The bill in this cause was filed by the assignees of Taylor, on the 20th of May, 1871, praying that the arrangement for the payment of salaries to Henry V. Butler and Henry V. Butler, Jr., and the agreement by which commissions were paid, may be set aside as fraudulent as against the complainants; that an account may be taken of the transactions of the company, especially of the sums paid for salaries and commissions; that the defendants may be restrained from paying those salaries or commissions, and that the complainants may have the benefit of such accounting, and receive what is due them as stockholders.

An amendment was made to the bill, praying for a receiver, on the ground of the alleged insolvency of the company.

Gardner v. Butler.

In the first place, it is insisted that the copartnership between Butler and Taylor, in its essential features, continued after the formation of the company, the same as before; that the corporate body was a mere device for the more convenient prosecution of the partnership business, and that, therefore, the rights of the parties to this suit are to be ascertained and determined according to the principles which govern a copartnership between individuals, in which event one partner will be entitled to no remuneration for his services to the firm, in the absence of an agreement with his copartner for compensation. The evidence and circumstances surrounding this case fail to support this view of the appellants.

The acceptance of the charter, and the organization under it, clearly worked a dissolution of the partnership. It does not appear, according to my judgment, that a single act was ever done by the principals, or in their behalf, which testified to the continued existence of the copartnership, or which manifested the existence of an agreement or understanding, on their part, that the company was a mere auxiliary to the promotion of the partnership transactions. Obviously, one of the chief objects of incorporation was to limit their personal responsibility. The immunity they thereby intended to secure would, at least, have been endangered, if the partnership was still to be regarded as the principal, and the corporation its mere instrument or agency. That such a relation was to continue to subsist, was never declared by word or deed of the alleged parties to it.

No reason appears why the partnership should have been maintained; neither party could derive any benefit from it. It could not have been Taylor's purpose to retain an equal voice in the management of the business, for the most amicable relations continued to exist between the partners, and their confidence in each other was unshaken, so that Taylor did not hesitate to commit the control of the stock and of the affairs of the company to Butler.

Gardner v. Butler.

That Taylor supposed that under the new arrangement he would still participate equally in the profits, there can be no doubt, and his expectations were realized in the fact that, up to the time of his insolvency, Butler continued to superintend the business, and to negotiate and make the sales and purchases, at the same compensation he had received before that time.

The same considerations which had prompted Butler to form the partnership, still influenced him in conducting the affairs of the corporation. The company would undoubtedly have had the benefit of pecuniary aid from Taylor in any emergency, as fully as the partnership had received it. Although he was under no legal obligation to extend it, his interest would have led him to do so. For this, and by reason of the relationship existing between them, it may reasonably be presumed that Butler was willing to render his services as before, while the benefit accrued to his brother-in-law.

But when Taylor became insolvent, the considerations which moved Butler wholly failed. Strangers would reap the advantage of his skill and labor, and the company was deprived of the assistance of a capitalist who had a very large interest in sustaining its credit and promoting its success. If the partnership had then existed, it would have been dissolved by Taylor's insolvency and consequent voluntary assignment for the benefit of his creditors. 3 *Kent Com.* 57; *Arnold v. Brown*, 24 *Pick.* 89; *Collyer on Part.* §§ 111, 112. It was a relation founded on personal confidence, and Butler could not have been compelled to receive a stranger into the association. After the assignment there could have been no partnership, so far as the complainants were concerned, without the assent of Butler, and Butler was under no obligation, either legal or moral, to render his services to the company without just remuneration. The rights of these parties must be adjudicated upon the law applicable between shareholders of corporations and their directors, in the management of corporate property.

Gardner v. Butler.

On this branch of the case, the complainants claim that the directors of the corporation occupied a position of trust which disabled them from making a valid contract with themselves, and that, therefore, all payments to themselves under the special agreements were illegal, and should be refunded.

That directors of a company shall not be permitted to enter into engagements in which they have a personal interest conflicting with the interests of those whom they are bound by fiduciary duty to protect, and that no consideration of their apparent or intrinsic fairness will induce a court, either of law or equity, to enforce them against the resisting *cestui que trust*, is well settled. The rule has been so recently asserted in this court that it must be assumed to be the law of this case. *Stewart v. Lehigh Valley R. R. Co.*, 9 Vr. 505.

The rule is, that the trustee cannot fortify himself by a contract which he makes with himself, or for his own benefit, and set it up, either at law or in equity, as a valid obligation. It is of no binding force as a contract, and the *cestui que trust* may repudiate it at will. The agreements, therefore, which the directors made with themselves, must be pronounced to be illegal, and can furnish no support to their defence, as contracts. But while the express undertaking is without legal force, the directors of a company have a right to serve it in the capacity of officers, agents or employes, and for such services the law will enable them to recover a just and reasonable compensation. The law restrains them from making a contract where their own gain intervenes between their exercise of judgment and their duty as trustees, but it does not operate to deprive the company of the service of those who, in many cases, may alone possess the skill requisite to the successful management and conduct of the corporate business, and who may have the chiefest interest in its prosperity. Stockholders, because they are directors, are not compelled to commit the success of their company to strangers, or else render their

Gardner v. Butler.

own services gratuitously. No claim which they may make against their company can acquire any support or validity from the fact that they have expressly sanctioned it; it must rest exclusively upon its fairness and justice, and be enforced upon the *quantum meruit*. That such is the full scope and effect of the rule, and the extent to which the transaction is annulled, will be found by an examination of the cases.

Aberdeen Railway v. Blakie, 1 Macq. H. L. Cas. 461, is much relied upon by the complainants. There Blakie, who was chairman of the railway board, made a contract for railroad chairs with the firm of which he was a member. The company, after accepting some of the chairs, refused to receive the balance, and he instituted his suit to compel the performance of the contract. It was properly held that the company had a right to repudiate the contract, and that it could not be enforced against their dissent. If the action had been brought to recover for the chairs which had been delivered and accepted, I apprehend it would not have been held, in any court, that the company could have retained the property and have refused to pay for it—not the contract price, but what it was reasonably worth. This case would be applicable to this discussion, if a new board of directors had refused to recognize the validity of the agreement with Butler, and he was now attempting to enforce a claim for damages for not continuing the employment for the stipulated term. It may be safely asserted that no authority can be found which will permit a corporate body to retain property conveyed to it by a director, or to receive services which he was not bound to render as a director, without paying him a fair equivalent.

In *Flanagan v. Great Western Railway*, L. R. (7 Eq.) 116, the contract with the director was executory, and the court refused to order a specific performance of it. In *Butts v. Wood*, 37 N. Y. 317, the suit was maintained by a stockholder to set aside the proceedings of directors, who fraud-

Gardner v. Butler.

ulently voted and paid an unjust claim to one of their number.

The right of directors to vote themselves \$200,000, for a grant they had transferred to their company, was successfully challenged in *Coleman v. Second Av. R. R.*, 38 N. Y. 201. The directors claimed that if the company repudiated their acts in purchasing from themselves, they must restore the grant. To this the court answered, that the plaintiffs had not asked for any such judgment; that their claim was based entirely upon the validity of their transfer, and the judgment of the referee for the full claim was based upon that only, and that therefore the referee's judgment was rightly reversed by the general term. There was another sufficient reason in that case for not requiring a restoration of the grant: The court held that the directors had no title to the grant at the time they transferred it to the company, consequently there was nothing to be restored.

The doctrine is well stated in *Great Luxembourg Railway v. Magnay*, 25 Beav. 586, where Magnay, who was president of that company, was furnished with the money to purchase for his company the concession of another line, and purchased it from himself, being the concealed owner of it. The master of the rolls said: "I proceed to explain what I mean by the proposition that an agent or a trustee cannot retain any benefit for himself from such a transaction. Suppose a company desired to buy an estate, and the trustee undertook to buy it for them, concealing the fact that it was his own estate, and if he then sells it to the company of which he is a director, for double its value, the court would not allow the transaction to stand. It would say to the company, you must repudiate the bargain altogether, or you may adopt it if you think fit, but if from any circumstance whatsoever it becomes impossible to return the estate, all that the trustee would be entitled to would be the full value of the estate sold; but when it is said that he cannot make any profit by the transaction, it is not meant

Gardner v. Butler.

that he is not to have the proper value of the property which is actually taken by the company.”*

The same principle must apply, whether it is property conveyed or services rendered to the company. The cupidity and avarice of the trustee is guarded against by giving the *cestui que trust* the right to repudiate the contract at all times, where it is executory, and to allow simply a just remuneration, without reference to the contract price, where it is executed. The trustee thus derives no advantage from his breach of duty, and the company can suffer no detriment from his service in their behalf.

In this case, Butler, being a director, made a contract with the board to serve as president for a fixed salary, and he also agreed that the firm of which he was a member should sell the manufactured goods of the company for a certain percentage of the gross amount of sales. He had a right to serve the company as president, and also to sell their goods and to receive an allowance for it, but he had no right to make a bargain by which his remuneration was fixed. The position he occupied incapacitated him from doing that, because it involved a conflict between his official duty and his personal gain. The company had no right to presume that Butler had assented to serve for the salary he had received prior to Taylor's insolvency, because the resolutions passed were equivalent to a notice that he demanded an increase, and that he would no longer perform in person a portion of the duties which had devolved upon him prior to that time. He could not bargain for the sum he should receive, but he had a right to terminate the employment on the then existing terms, and leave his compensation to be determined by a proper tribunal. The contract will not be regarded, but the services having been rendered, and the company having received the benefit of them, it would be manifestly inequitable to deny to the trustee a fair equiva-

[* See *Trenton Banking Co. v. McKelway*, 4 Hal. Ch. 84.—REP.]

Brown v. Easton.

lent for them. It would pervert a rule of law which is intended to guard against fraud and injustice.

The right of a trustee to recover on the *quantum meruit*, where the contract is illegal, is recognized in our courts. *Mulford v. Minch*, 3 *Stock*. 16; *Huston v. Cassedy*, 2 *Beas*. 228; *Smith v. Drake*, 8 *C. E. Gr.* 302; *Stratton v. Allen*, 1 *C. E. Gr.* 229.

The case resolves itself, then, into this question: Have the directors, whose action is the subject of controversy, retained for their services more than they are justly and reasonably entitled to? The burden is on them to show what they reasonably deserve to have, and no unjust exaction will be permitted.

The objection to the salary of the president is not pressed, and all the witnesses of experience concur in saying that the commission charged was moderate and within the customary rates. The sums claimed by the defendants appear to have been fairly earned, and may therefore be retained by them.

There is no proof of insolvency. When the bill was filed, in 1871, the assets of the company were valued at \$359,000, and the debts were only \$2,459. It does not appear that since that date its condition has materially changed.

The decree below should be affirmed, with costs.

Decree unanimously affirmed.

EDWARD G. BROWN and others, appellants,

and

JAMES T. EASTON and others, respondents,

An order having been made that an injunction bond should be delivered to the obligees for prosecution, and a suit having been instituted thereon,—*Held*, that the order, although made without regard to the equities of the case, could not be rescinded except for equities shown, and on equitable terms.

Brown v. Easton.

On appeal from a decree of the vice-chancellor, reported in *Easton v. New York & L. B. R. R. Co.*, 3 *Stew.* 236.

Mr. John W. Taylor, for appellants.

I. The injunction bond in question was a perfect obligation as soon as filed with the clerk in chancery.

High on Inj. § 948.

II. The bond became forfeited immediately upon the dismissal of the bill and dissolution of the injunction.

New York & L. B. R. R. Co. v. Dennis, 11 *Vr.* 340.

III. The appellants had a cause of action, and a right to sue on the bond, forthwith, after the forfeiture, whether entitled to the custody of the bond or not.

Lathrop v. Southwick, 5 *Mich.* 436; *Higley v. Robinson*, 7 *Wend.* 482; *Zeigler v. David*, 23 *Ala.* 127; *High on Inj.* § 948.

IV. The court of chancery had no jurisdiction to settle the question of liability and damages, much less to enforce a recovery against the sureties on the bond in question.

Easton v. N. Y. & L. B. R. R. Co., 11 *C. E. Gr.* 359; *Garcie v. Sheldon*, 3 *Barb.* 232; *Higgins v. Allen*, 6 *How. Pr.* 30; *Learitt v. Dabney*, 2 *Sweeny* 613; *Bein v. Heath*, 12 *How.* 168; *Merryfield v. Jones*, 2 *Curt.* 306.

V. The case of *Wauters v. Van Vorst*, 1 *Stew.* 103, cited by the vice-chancellor to the contrary, was on a *ne exeat* bond, which is in the nature of a bail bond, and governed by entirely different principles. What the chancellor says in that case relates to a *ne exeat* bond, or a bond taken in lieu thereof. There is nothing in that case, nor in the cases cited as authority for the opinion in that case, warranting the view taken by the vice-chancellor in making the order appealed from. The only case in the court of chancery of New Jersey at all relevant, is that of *Easton & McMahon v. N. Y. & L. B. R. R. Co.*, 11 *C. E. Gr.* 359, which holds that the chancellor has no such power as the vice-chancellor now contends for.

Brown v. Easton.

Mr. John P. Jackson, for respondents.

I. The order to rescind for the purpose of rehearing was properly granted. The court will grant a rehearing when a mistake, either in law or in fact, has been made.

Att'y-Gen. v. N. Y. & L. B. R. R. Co., 9 C. E. Gr. 59; *Brumagin v. Chew*, 4 C. E. Gr. 337; *N. J. Z. Co. v. N. J. F. Co.*, 1 *McCart*. 380.

II. It is manifest, from the opinion of the vice-chancellor (reported in 3 *Stew.* 236), that there existed a misapprehension with respect to *two important principles* of law.

(a) Contrary to the assumption when the original order of November 13th, 1875, was made, it has since been declared that the obligors in an injunction bond *have a clear right*, before being required to answer to a common law action, and, as an essential preliminary step to such action, *to the judgment of the chancellor* whether the equity of the case in hand requires such order for prosecution to be withheld. See *N. Y. & L. B. R. R. Co. v. Dennis*, 11 *Vr.* 340, 362, *Beasley, C. J.*

Att'y-Gen. v. N. Y. & L. B. R. R. Co., 9 C. E. Gr. 49; *Att'y-Gen. v. Pat. & Hud. R. R. Co.*, 1 *Stock.* 526; *Milner v. N. J. R. R.*, 6 *Am. Law Reg.* (1858), 7.

(b) Contrary to the principle decided in this state since the original order of November 13th, 1875, was made, it was, at that time, supposed that the court of chancery could give no remedy on an injunction bond, unless jurisdiction were conferred by consent of the obligors expressed in the bond, or in some other appropriate mode. But the law now is, that the chancellor *has power* over all bonds given pursuant to its orders and rules, and may determine all questions of liability and damages arising thereon.

Wauters v. Van Vorst, 1 *Stew.* 103; *N. Y. & L. B. R. R. Co.*, 3 *Stew.* 236, and cases cited; *N. Y. & L. B. R. R. Co. v. Dennis*, 11 *Vr.* 371, *Runyon, C.*; *Shann v. Jones*, 4 C. E. Gr. 251; *Thompson v. Engle*, 3 *Gr. Ch.* 271; *Silver v. Campbell*, 10 C. E. Gr. 465; 2 *Dan. Ch. Pr.* (3 *Am. Ed.*) 1279, note 2;

Brown v. Easton.

Wood v. Mann, 3 *Sumner*, 318; *Gordon v. Sims*, 2 *McCord Ch.* 151; *Cowell v. Lippitt*, 3 *R. I.* 92; *Field v. Post*, 9 *Vr.* 349; *Solomon ads. Gregory*, 4 *Harr.* 115.

III. The only remedy which the petitioner had, on the promulgation of the principles above mentioned, was to ask for a rehearing; for the order of November 13th, 1875, under which the respondents were suffering, *had already been appealed* to the court of errors and appeals, but the appeal was dismissed on the ground that the matter of the custody of the bond rested entirely in the discretion of the court. (See minutes of the court of errors, March, 1876; also vice-chancellor's statement, 3 *Stew.* 239).

IV. The appeal in this case will not lie.

(a) The bond might, in the first instance, have been required or waived, according to the discretion of the chancellor. (See rule 46 of chancery.)

(b) It could be discharged by order of the court at any time, and the appellants left without security.

Henwood v. Jarvis, 12 *C. E. Gr.* 247; *Debazin v. Debazin*, 12 *C. E. Gr.* 254; *Williamson v. Hyer*, 4 *Wend.* 172; *Bien v. Heath*, 12 *How.* 179.

(c) Nor does the injunction contained in the order give it any appealable quality; it is temporary in its operation, does not affect the rights of the parties, and no one can be said to be *aggrieved* by the order. The appellants may immediately apply for an exercise of the chancellor's discretion. The injunction is merely ancillary to the order, not final nor touching the merits of the case; it merely serves to *hold the question where it stood* when the appellants made their first motion for leave to prosecute.

See *Att'y-Gen. v. Paterson*, 1 *Stock.* 627; *Morgan v. Rose*, 7 *C. E. Gr.* 583; 2 *Waterman's Eden on Inj.* 374; *Kerr on Inj.* (2d Ed.) 11, 533, and cases cited; *High on Inj.* § 15.

(d) Nor is it any objection, either to the rehearing or to the proper enforcement of the order for rehearing by means

Brown v. Easton.

of the injunction, that the appellants have commenced a suit at law upon the bond.

Ashland v. Braddick, 3 Y. & C. 237; *Story v. Johnson*, Y. & C. 586.

V. The same principles would govern the court in this case as in any other threatened injury from an inequitable prosecution in a common law court.

Gifford v. Thorn, 1 Stock. 702; *Tompkins v. Tompkins*, 3 Stock. 513.

Even when judgments have been obtained, the aid of the court of chancery may be asked to stop the plaintiff from realizing on inequitable claims.

DIXON, J.

After the decision of this court in *N. Y. & Long Branch R. R. v. Dennis*, 11 Vr. 340 (to the effect that an injunction bond, conditioned to pay damages if it should be determined that the complainants were not equitably entitled to the restraining order obtained, was forfeited by a decree dissolving the order and dismissing the bill), the defendants in that cause presented to the chancellor a petition for the rescinding of an order, granted on the opinion of the vice-chancellor (see *Easton v. N. Y. & Long Branch R. R.*, 11 C. E. Gr. 359), by which it was directed that the bond should be delivered to the obligees (the appellants here) for prosecution. The petition alleged, as the reasons for such rescission, that the order was made on the assumption that the court of chancery had no jurisdiction over the sureties of the bond, the question of their liability belonging exclusively to the common law courts, and it was necessary that the obligees should be allowed the privilege of suing upon the bond in a court of law; whereas, it was alleged, the chancellor had jurisdiction over the liability of the obligors, and this court had decided that the petitioners were entitled to the exercise of the chancellor's discretion as to whether such order should be made or not.

Brown v. Easton.

Upon this petition, the vice-chancellor held that, before making the order for delivery of the bond, he ought to have passed upon the preliminary question, whether any considerations existed rendering it inequitable for the obligees to seek reparation in a court of law for the injuries suffered in consequence of the injunction; and, because he had not considered that question, he absolutely and without terms rescinded his original order, and directed the return of the bond to the files of the court of chancery.

From this order the appeal is taken.

It is clear that, without the order for the delivery of the bond, the obligees would be unable to maintain any action on that instrument. Before granting his injunction, the chancellor had required, not that the bond should be delivered to the parties restrained, but that it should be filed with his clerk, in escrow, as it were, to be used by him for indemnifying those who might be damaged by his injunction. Whatever equitable claims to indemnity those persons may have had, they acquired no legal rights in this obligation until the chancellor, under his order, actually or constructively delivered it to them. It is equally clear, that the chancellor had the right to make such a delivery, for that was the very purpose of the escrow.

On the delivery, therefore, the right of the obligees became a legal one, and justified the suit at law, which they instituted for the enforcement of the obligation. But this right was not absolute; it was subject to such conditions as attached to the order by which it was authorized. One of these conditions was, that, for good cause and on reasonable terms, the order might be changed or discharged. Every judgment or decree is, for a time, at least, thus subject to rescission or modification, if it appears to be such as should not have been rendered; and where, as here, an order has been made without considering all the questions which the complaining party was entitled to have determined, the discretion of a court of equity should be liberally exercised in favor of a review. Nothing has transpired in this cause so

Brown v. Easton.

conclusive of the rights of parties as to make such review either unjust or impracticable.

On the other hand, the order for delivery being one which the court had power to make, it should stand until it becomes apparent that a full consideration of the matters involved would have led to a different result. It is not enough to show that the court erred in its method of reaching a conclusion; the conclusion itself must be shown to be wrong. And just here is the impropriety of the order now under review: When, in the original cause wherein the bond was given, it was adjudged that the injunction was inequitable, the obligees became entitled to have the bond put in force for their indemnity, unless some special equities justified a denial of their claim. Whether the chancellor could himself have enforced the obligation need not now be decided, for having, after hearing the parties, delivered the bond for prosecution at law, that step, being merely a choice of forums, ought not to be retraced, unless special equities are shown. But the fact that hitherto the court has declined to consider whether such equities exist, does not indicate that a full examination would bring them to light. Neither in the petition presented, nor in the reasons given for the judgment below, are any grounds stated on which a rescission of the order for delivery can be justly based.

In my judgment, therefore, the order appealed from should be reversed, with costs, save that, to the extent of staying the suit at law until the respondents shall have reasonable opportunity for presenting equitable grounds for the rescission, on reasonable terms, of the order for delivery, it may stand.

Decree unanimously reversed.

Lyon v. Citizens Loan Ass'n.Kimble v. Denton.

DANIEL M. LYON and others, appellants,
and

THE CITIZENS LOAN ASSOCIATION OF NEWARK, respondents.

Mr. John W. Taylor, for appellants.

Mr. John Whitehead, for respondents.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the chancellor in the case below, 2 *Stew.* 110.

JACOB KIMBLE, appellant,
and

ELIZABETH T. DENTON, respondent.

Mr. Lewis Cochran, for appellant.

Mr. Thos. Kays, for respondent.

PER CURIAM.

This decree affirmed for the reasons given by the vice-chancellor in the case below. *Denton v. Cole*, 3 *Stew.* 244.

For affirmance—BEASLEY, C. J., DALRIMPLE, DEPUE, DIXON, KNAPP, REED, SCUDDER, VAN SYCKEL, WOODHULL, CLEMENT, GREEN, LILLY, WALES—13.

For reversal—DODD, LATHROP—2.

Flaacke v. Jersey City.Drake v. Dawson.

HENRY FLAACKE, appellant,

and

THE MAYOR &C. OF JERSEY CITY and others, respondents.

Mr. Isaac S. Taylor, for appellant.*Mr. Leon Abbett*, for respondents.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the chancellor in the case below, 1 *Stew.* 110.

WILLIAM M. DRAKE, appellant,

and

JACOB H. DAWSON, respondent.

Messrs. C. F. & C. E. Hill, for appellant.*Mr. Geo. F. Tuttle*, for respondent.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the chancellor in the case below, 2 *Stew.* 383.

INDEX.

A.

Abatement.

See LEGACY, 2; PRACTICE, 5.

Accident and Mistake.

1. A mortgagee cannot avail himself of an assumption of a mortgage inserted in a deed of the premises by the mistake of a scrivener in copying the grantor's deed; neither of the parties to the deed intending or being aware of it. *Stevens Institute v. Sheridan*, 22
 2. A complainant alleged that he was induced to execute certain deeds, by the false representations of the defendants, and also through his own ignorance of the fact that the lands had been owned by his mother, and devised by her to him. The evidence utterly failed to substantiate the bill.—*Held*, that he could not be allowed to change his position and claim relief on the ground that, although he voluntarily executed the deeds to the defendants, he did so under a mistake as to the extent of his interest in the lands conveyed. *Pasman v. Montague*, 385
 3. Equity will reform written instruments for the correction of mistakes, but to warrant the exercise of this power, the court requires clear and convincing proof. *Rowell v. Flannelly*, 612
 4. In cases of mutual mistake the court will not reform, but rescind. *Id.*, 612
- See SOLICITOR; TRUSTS, 1; VENDOR, 3.

Account.

1. A decree requiring a copartner to account, should be denied in every case where it appears the party seeking the account, has, by his laches, rendered it impossible for the court to do full justice to both parties. *Stout v. Seabrook*, 187
 2. If, in an action for an account, the court is satisfied nothing is due to the complainant from the defendant, a dismissal must be directed. *Id.*, 187
- See LIMITATIONS, 4-7; PARTITION, 4.

Agent.

1. A release by an attorney in fact of the holder of a mortgage, the latter having accepted the consideration from the former with knowledge of the release,—*Held*, binding on the principal although the attorney exceeded his authority in taking the release. *Tooker v. Sloan*, 394
See MORTGAGE, 1; CONVEYANCE, 2; SETTING ASIDE SALES, 6.

Amendment.

1. The court has power to order an amendment even on final hearing, but it is a power never exercised except when the ends of justice render it absolutely necessary, and its exercise will not abridge the right of defence. *Ogden v. Thornton*, 569
2. An appellate tribunal will sometimes reverse a decree and send a cause back to a court of original jurisdiction, in order that an amendment to settle the real merits of the controversy may be made. *Id.*, 569

Appeal.

See AMENDMENT, 2; COSTS, 1.

Assignment.

1. Any writing, which clearly appropriates a fund or property to a person, will, in equity, be esteemed an assignment. Equity disregards mere form. *Bower v. Hadden Blue Stone Co.*, 171
See MORTGAGE, 4, 9.

Attachment.

See PARTIES, 6; PLEADING, 3; SETTING ASIDE SALES, 1.

B.**Bankruptcy.**

See PARTIES, 3; PRACTICE, 5; SHERIFFS.

Bills and Notes.

See CANCELLATION OF INSTRUMENTS, DONATIO CAUSA MORTIS; SET OFF.

C.**Cancellation of Instruments.**

1. This court has power to decree the surrender and cancellation of a worthless negotiable instrument, though a complete defence at law exists; but, to justify a resort to this court, it must appear that the defence at law will be attended by uncertainty, or that the surrender of the instrument

Cancellation of Instruments—Continued.

is necessary to full relief, or that the person who alone
has the right to defend is under a strong bias in favor of
the plaintiff. *Smith v. Smith*, 564

See ACCIDENT, 4.

Cases Criticised.

Bellows v. Wilson, 2 Stew. 124.	
<i>Reversed</i> , Wilson v. Bellows.....	282
Belmont v. Coman, 22 N. Y. 438.	
<i>Explained</i> , Heid v. Vreeland.....	593
Bower v. Hadden Blue Stone Co. 3 Stew. 171.	
<i>Affirmed</i> , Lyon v. Bower.....	340
Citizens Loan Association v. Lyon, 2 Stew. 110.	
<i>Affirmed</i> , Lyon v. Citizens Loan Association.....	732
Cushing v. Blake, 2 Stew. 399.	
<i>Affirmed</i> , Cushing v. Blake.....	689
Dawson v. Drake, 2 Stew. 383.	
<i>Affirmed</i> , Drake v. Dawson.....	733
Denton v. Cole, 3 Stew. 244.	
<i>Affirmed</i> , Kimble v. Denton.....	732
Easton v. N. Y. & L. B. R. R., 3 Stew. 336.	
<i>Reversed</i> , Brown v. Easton.....	725
English v. English, 12 C. E. Gr.* 579.	
<i>Distinguished</i> , O'Neill v. O'Neill... ..	119
Farnam v. Brooks, 9 Pick. 244.	
<i>Denied</i> , Todd v. Rafferty.....	258
Flaacke v. Jersey City, 1 Stew. 110.	
<i>Affirmed</i> , Flaacke v. Jersey City.....	733
Freeholders of Middlesex v. State Bank, 2 Stew. 268.	
<i>Affirmed</i> , Freeholders &c. v. State Bank.....	311
Gale v. Morris, 2 Stew. 222.	
<i>Affirmed</i> , Gale v. Morris.....	285
Gardner v. Butler, 3 Stew. 703.	
<i>Affirmed</i> , Gardner v. Butler.....	702
Gardner v. Gardner, 5 Cush. 483.	
<i>See</i> Mut. Ins. Co. v. Brown.....	202
Glading v. Cubberly, 2 Stew. 104.	
<i>Affirmed</i> , Cubberly v. Glading.....	339
Glasser v. Glasser, 1 Stew. 22.	
<i>Distinguished</i> , Vandegrift v. Vandegrift.....	77

Cases Criticised—Continued.

Hardenburgh v. Blair, 3 Stew. 42.

Reversed, Hardenburgh v. Blair..... 645

Humphrey v. Tayleur, Amb. 136.

Doubted, Burnet v. Burnet..... 600

Jewett v. Dringer, 2 Stew. 199.

Reversed, Jewett v. Dringer..... 291

O'Neil v. Cleveland, 2 Stew. 457.

Reversed, O'Neil v. Cleveland..... 273

Trustees of Public Schools v. Taylor, 3 Stew. 618.

Affirmed, Trustees &c. v. Trenton..... 667**Comity.***See* CORPORATIONS, 4; EXECUTORS, 4; PRACTICE, 6.**Commissions.***See* EXECUTORS, 12.**Common Law.***See* PREROGATIVE.**Confusion of Goods.**

1. If a party having charge of the property of others, so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produced it, and it is for him to distinguish his own property or lose it. *Jewett v. Dringer*, 291
2. A junk dealer, by fraudulent collusion with the employes of a railroad corporation, obtained large quantities of old iron &c. at much less than the actual weight or value. On delivery it was thrown indiscriminately on other heaps of old iron &c. belonging to him, so as to be indistinguishable.—*Held*, that he must forfeit the whole mass to the company. *Id.*, 291

Constitution.

1. The abrogation of a prior statute by a subsequent statute, or a subsequent constitutional provision which is self-executing, by reason of the repugnancy between the two, extends only so far as they are incompatible; in other respects the original law is left in full force and effect. *Trustees &c. v. Trenton*, 667
- See* MUNICIPAL CORPORATIONS, 4; SPECIFIC PERFORMANCE, 2; TAXES, 4, 5.

Contract.

1. When the parties to a contract have expressed their meaning by plain words, there is nothing to construe, and in such a case all a court can do is to enforce the contract.
Bower v. Hadden Blue Stone Co., 171
- See CORPORATIONS, 7; SPECIFIC PERFORMANCE; VENDOR, 2, 3.

Conveyance.

1. At common law, signing is not necessary to the due execution of a deed, but it is made so by the statute of frauds.
Mutual Benefit Life Ins. Co. v. Brown, 193
 2. But if the grantor's name is written in his presence and by his direction, it is his act, and he will not be permitted, in a court of equity, to repudiate a deed thus executed.
Id., 193
 3. A certificate of acknowledgment is not invalidated or affected by the want of recollection of the grantor or the commissioner as to the transaction. *Tooker v. Sloan*, 394
 4. The validity of a deed must be determined by facts existing at the time of its execution; it cannot be vitiated by facts arising *ex post facto*. *Ogden v. Thornton*, 569
- See EASEMENT, 1; MORTGAGE, 14; VENDOR.

Corporations.

1. On the appointment of a receiver of an insolvent corporation, its title to its property is divested by force of law.
Freeholders of Middlesex v. State Bank, 311
2. Lands owned by a partnership were sold to a corporation consisting mainly of the partners. No deed was executed, but possession was taken and improvements made by the corporation. In a suit by a receiver of the corporation to compel a formal conveyance for the benefit of the creditors,—*Held*,
 - (1) That a mortgage on the premises, duly authorized by the corporation, but in fact executed by the former owners (the money derived therefrom was, in fact, expended by and for the benefit of the corporation), was an encumbrance thereon from the date of its execution.
 - (2) That a mortgage given by the corporation (before the conveyance) was also an encumbrance.
 - (3) That a judgment recovered against one of the partners, after the premises had been sold to the corporation and possession openly taken by it, was not, in equity, a lien thereon.
 - (4) That, although, in ordering the partners to execute a formal conveyance, the wife of one, entitled to dower,

Corporations—Continued.

- could not be compelled to join therein, yet her husband, having received a full consideration and being bound to give a title clear of encumbrance, might be decreed to indemnify the corporation against her claim, unless she voluntarily relinquish it. *Cook v. Watson*, 345
3. A foreign corporation took a mortgage on lands in this state, to secure a loan already made to the mortgagor, on stock collateral, which became depreciated.—*Held*, that although its charter may not have authorized the taking of a mortgage in another state, as an original investment, yet the corporation might take such mortgage by way of additional security for such loan, and the mortgage, in its hands, is valid. *National Trust Co. v. Murphy*, 408
- 4 Where a receiver of a foreign corporation, complainant, has been appointed in another state, since the beginning of the suit, he may be substituted as complainant on such terms as may be imposed by the court, for the protection of creditors of such corporation, who are citizens of this state. *Id.*, 408
5. By the general corporation act of 1849, the directors of any corporation organized thereunder were, in certain cases, by their non-feasance, rendered personally liable for the debts of the corporation. By the revision of 1875, it was provided that such liability should be incurred in case of neglect or refusal for thirty days after written request by a creditor or stockholder to perform the duty imposed. A demurrer to a bill by a creditor whose claim arose in 1877, was sustained, because of failure to allege that a written request to perform this duty had been made. *Nassau Bank v. Brown*, 478
6. A drayman, who is in the regular employ of a corporation, and whose services are of a kind or class which the corporation must have in order to continue its business, is entitled to the protection given to employes by the sixty-third section of the act concerning corporations. *Watson v. Watson Manufacturing Co.*, 588
7. A director of a corporation cannot make with himself, or for his own benefit, a contract which will bind the company. Such contract may be repudiated by the company at the instance of a stockholder. *Gardner v. Butler*, 702
8. If directors are employed in the business of the company, and agree to pay themselves a stipulated sum, the agreement is void, and no recovery can be based upon such

Corporations—Continued.

contract, but for such services as they render they can recover upon a *quantum meruit*. *Id.*, 702

See EXECUTORS, 5 ; JURISDICTION, 1 ; RAILROADS ; SAVINGS BANKS ; SETTING ASIDE SALES, 6.

Costs.

1. The orphans court ordered an executor to give security for his trust. From this order he appealed, the next day, to the prerogative court. A sale of the testatrix's personalty had been advertised by him to be made on the latter day, and he was proceeding therewith without having given the security, whereupon, on application of the testatrix's children interested in her estate, an injunction was issued to restrain such sale until after the bond had been given. Afterwards it was given.—*Held*, that since it was the executor's duty to comply with the order or postpone the sale until he had obtained its reversal, he must pay the costs of the injunction suit. *Titus v. Titus*, 95
2. To a bill for foreclosure filed by a second mortgagee, the first mortgagee was made a party defendant, appeared, proved her debt, and obtained a decree. At the sale of the premises the amount realized was insufficient, after deducting execution fees, to satisfy the first mortgage. The first mortgagee insisted that the complainant must pay the execution fees.—*Held*, that the sheriff was entitled to deduct and retain his execution fees from the proceeds of the sale, and that the complainant was not liable to pay them. *Berlin Building Association v. Clifford*, 482
3. The fact that the evidence to prove a deed, absolute on its face, defeasible, is very conflicting, and that the conclusion that it was merely a mortgage was reached only by the preponderance of the evidence, is good reason for adhering to the general rule that a mortgagee is entitled to his costs on a bill to redeem. *Forman v. Bulson*, 493
4. Where each party to a suit is partly successful, costs should not be awarded to either. *Coddington v. Idell*, 540

See SHERIFFS.

Creditor's Bill.

1. A surety on a guardian's bond paid more than his aliquot share on account of his liability for such guardian's waste. He afterwards died, and also one of his co-sureties.—*Held*, that the executor of the first-named surety might, without having recovered a judgment at law, file a creditor's bill against the administrator and daughter

Creditor's Bill—Continued.

of the co-surety, to set aside a mortgage given voluntarily by the co-surety to such daughter, and also to recover, from the co-surety's estate, the excess paid by his testator. *Shurts v. Howell*,

418

See FRAUDULENT CONVEYANCES.

Curtesy.

1. A husband is entitled to curtesy in the wife's equitable estate of inheritance, if the requisites of such a title in legal estates exist. Actual possession of the estate, or the receipt of rents, issues and profits by her, or possession by her trustee for her benefit, is considered as such seizin of the equitable estate as is equivalent to legal seizin. *Cushing v. Blake*,

689

2. The husband's curtesy is one of the legal incidents of the wife's estate of inheritance, and he will not be excluded from rights in property springing from the marital relation, except by words that leave no doubt of the intention. The fact that the limitation is to the wife, for her sole and separate use during her life, will not defeat his right as tenant by the curtesy. *Id.*

689

3. D., contemplating marriage, purchased and caused to be conveyed to B. certain lands, for the benefit of his intended wife. B. executed a declaration of trust, whereby, after reciting the conveyance to him and the fact that the marriage was about to take place, he acknowledged and declared that he held the premises in trust to and for the sole use and benefit of the intended wife, separate and apart from her intended husband, before and after her intended marriage; and, on the further trust, to convey to such person or persons as she, in her life-time, by writing, or by her last will or writing in the nature thereof, should appoint, and, on failure of such appointment, to her heirs at law, to hold to them, their heirs and assigns forever. The marriage took place, and the wife died, leaving issue of the marriage.—*Held*, that the husband was entitled to curtesy in the premises so conveyed in trust. *Id.*,

689

D.**Debtor and Creditor.**

1. A residue of an estate was given to a widow for life, and after her death, to her children. No provision was made for their support meanwhile, except that advances might

Debtor and Creditor—*Continued.*

be made to them by the widow. She was sole executrix, and pledged certain stocks of the estate as collateral security for her own debts. Some of the children filed a bill against her creditors to obtain the stock. The stock produced no income, and had depreciated very much in market value. The widow had greatly wasted the estate. —*Held*, that the court would not order a sale of the stock for the purpose of investing the proceeds and appropriating the income for the benefit of the creditors during the widow's life-time; and that, under the circumstances, in view of the great waste of the estate that she had committed, she had no interest for the creditors to take. *Prall v. Hamil*,

557 -

See CORPORATIONS, 4; CREDITOR'S BILL; FRAUDULENT CONVEYANCES; MORTGAGE, 4-6; ORPHANS COURT, 2; PAYMENT; PREROGATIVE; SURETY; TRUSTS, 3-7.

Divorce.

1. On a bill filed by a husband, for a divorce *a vinculo*, on the ground that, at the time of the marriage, a former husband of his wife was living, the wife's application for counsel fees and alimony will not be refused on *ex parte* affidavits contradicting the denials of her answer. *Vandegrift v. Vandegrift*, 76
2. Where, in a suit for a divorce for gross cruelty, the testimony of the defendant in regard to his own conduct, as well as other matters, is shown to be untrue, his protestations of repentance and future reformation cannot be entertained as a ground for refusing such divorce. *O'Neill v. O'Neill*, 119
3. *English v. English*, 12 C. E. Gr. 579, distinguished. *Id.*, 119
4. To justify a decree of separation, actual physical violence need not be proved, but there must be shown reasonable ground to believe that, if the husband is allowed to retain his power over his wife, and she is compelled to remain subject to him, her life or health will be endangered. *Black v. Black*, 215
5. A wife will never suffer her person to be debauched until her affections are corrupted. *Id.*, 228
6. To prove adultery by circumstances, a criminal desire and an opportunity to gratify it, must be shown. Where these both concur, guilt is presumed. *Id.*, 228
7. Criminal desires may be inferred from strong expressions of attachment, stolen interviews and a clandestine correspondence. *Id.*, 228

Divorce—*Continued.*

8. A husband excluded his wife from their bed-room, and imputed to her physical malformation and consequent incompetency for the marital relation. He removed to another house, to which he denied her admittance, on the ground of such alleged incompetency, notwithstanding her expressed willingness to return to him and do her duty.—*Held*, that she was entitled to relief on her bill for maintenance. *Van Arsdalen v. Van Arsdalen*, 359
9. A husband and wife were living with the wife's father; the latter upbraided the husband for some trivial offence, whereupon the husband left the house, requesting his wife to go with him. She refused, and has never since then (in 1872) offered to live with him, or expressed any willingness to do so. Her bill, filed for a divorce for desertion, dismissed, in view of the facts. *Mayer v. Mayer*, 411

Donatio Causa Mortis.

1. The note of a donor is not the subject of a gift. *Smith v. Smith*, 564

Dower.

1. On a bill for dower in lands of an intestate, of three kinds (1) that which was subject to a mortgage put thereon by the intestate; (2) that which was purchased by him subject to a mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment thereof assumed by him; and (3) that which belonged to him as a member of a partnership,—*Held*,

(1) That, as to the first class, the personal estate must exonerate the land, and dower be assigned therefrom as if unencumbered.

(2) That, as to the second class, a mere assumption of a mortgage by a decedent is not such proof of an intention to make the debt his own as renders his personal estate primarily liable therefor, and dower must be assigned therefrom, subject to the mortgage.

(3) That, as to the third class, dower must be assigned, subject to the equitable adjustment of the claims of the partnership creditors, and of the partners *inter sese*. *Campbell v. Campbell*,

415

See CORPORATIONS, 2; LEGACY, 2.

Duress.

1. A wife, in order to settle a suit in which her husband was involved, and which he was very desirous of compromis-

Duress—*Continued.*

ing, and which disturbed and, perhaps, distressed him, gave a mortgage on property the title where to was in her.—*Held*, that the circumstances did not amount to duress. *Tooker v. Sloan*,

394

See **SETTING ASIDE DEEDS; PARTIES**, 1.

Easement.

1. To raise the presumption of a grant where title to an easement is asserted, it must be shown that the use has extended over a period of twenty years, and has been during that time continuous and peaceable. *Lehigh Valley R. R. Co. v. McFarlan*, 180
2. Proof of acquiescence by the owner of the servient lands, in the exercise of the adverse right, is indispensable in proving title to an easement by adverse user: *Id.*, 180
3. Where the user has been exercised by force, or by permission, or in the face of protests and in defiance of resistance, a grant cannot be presumed. *Id.*, 180
4. Resistance by words is sufficient to prevent the presumption of a grant of an easement. *Id.*, 180

Eminent Domain.

1. By virtue of an agreement with the owner of certain lands, a railroad company, before paying the sum stipulated, entered upon the land, built their road thereon and included it in a general mortgage of their lands &c. After their insolvency, and the appointment of a receiver by this court, the owner applied for the payment of the amount. It appearing that the sum agreed upon was grossly exorbitant, the court refused to order its payment, but directed that the compensation justly due the owner be ascertained and paid. *Coe v. N. J. Midland R. R.*, 20

See **MUNICIPAL CORPORATIONS**, 1.

Estates.

1. In equity, equitable estates are considered as legal estates, and are subject to the same incidents, properties and consequences as, under like circumstances, belong to similar estates at law. *Cushing v. Blake*, 689

Estoppel.

1. As against an innocent mortgagee, notice from the possession of lands cannot be set up by an occupant who was insolvent when he placed the title in the name of the mortgagor, and knew, soon after the time of the giving

Estoppel—*Continued.*

of the first of the two mortgages, that it had been given, and did not notify the mortgagee of his claims, but kept silent and permitted the mortgagor to borrow more money of the mortgagee on a second mortgage of the property, whereas if he had notified the mortgagee of his claim, when he first was made aware of the existence of the first mortgage, the mortgagee might have collected the mortgage debt of the mortgagor, and would have not made the second loan on security of the mortgaged premises. *Groton Sav. Bank v. Batty*,

126

2. A mortgagor intended to give, and the mortgagee expected to receive, a mortgage in fee, but, for want of words of inheritance, the mortgage, as executed, conveyed only an estate for life. A second mortgagee had such actual notice of the first mortgage as induced the belief that it was a mortgage of the fee, and, so believing, took the second mortgage.—*Held*, that, as against the second mortgagee, the first mortgage should be regarded as a mortgage of the fee. *Gale v. Morris*,

285

See EVIDENCE, 2; MORTGAGE, 7.

Evidence.

1. The opinion of experts in handwriting is evidence of low degree. *Mut. Ben. Life Ins. Co. v. Brown*,
- 193
2. A suitor who attempts to overcome his own written admission of a payment, can only succeed by the production of proof sufficient to make the truth of his claim clear. *Gibbons v. Potter*,
- 204
3. A witness who feigns forgetfulness of circumstances collateral to his main story, which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief. *Id.*,
- 204
4. Evidence must be weighed according to the means and opportunities of knowledge of the witnesses in regard to the facts whereof they testify. *Black v. Black*,
- 215
5. Although, by the statute concerning evidence (*Rev.* p. 378), a party cannot, in case the adverse party sues or is sued in a representative capacity, render his own testimony competent by calling such adverse party, yet the statute does not preclude him from calling such adverse party as his own witness. *Daw v. Vreeland*,
- 542
6. The competency of a witness in a suit in equity, depends entirely upon his qualifications at the time he is exam-

Evidence—Continued.

- ined, and not on the condition of the suit as to parties at the time the hearing takes place. *Williams v. Vreeland*, 576
7. The sixth section of the act concerning evidence only renders a complainant, otherwise incompetent, competent to a limited extent, and does not allow him to testify generally. His evidence must be limited to the disproof of so much of the defendant's answer as is responsive to the allegations of the complainant's bill. *Id.*, 576
8. As a general rule, evidence which is merely incompetent or irrelevant will not be suppressed prior to final hearing, but evidence which is scandalous, or has been taken irregularly or imperfectly, or in violation of the privileges of either of the parties, may be. *Id.*, 576
9. A material and controlling fact averred in the bill, and not denied or alluded to in the answer, must be taken as admitted. *Lee v. Stiger*, 610
- See ACCIDENT, 3; DIVORCE, 1, 2, 4; LEGACY, 10, 11; MORTGAGE, 12; NEW TRIAL; PLEADING, 2; REVIEW; SURETY, 1; WILLS.

Execution.

See COSTS, 2; FIXTURES, 1; POWERS, 4; TRUSTS, 3-7.

Executors and Administrators.

1. A direction to invest a share "in productive funds upon good securities," means only those that are designated by law; and a disregard of such requirement renders the executor personally liable, in case of loss or depreciation. *Ward v. Küchen*, 32
2. A specific legacy may remain invested in the stocks set apart and designated by the testator for the purpose in his will. *Id.*, 32
3. An executor, apprehending a depreciation in the stocks in which a specific legacy is invested, should protect the estate by converting them. *Id.*, 32
4. A non-resident testator held a mortgage on lands in the county of B., in this state.—*Held*, that the mere filing of an exemplified copy of his will in the surrogate's office of B. county, does not qualify the executors to maintain suit to foreclose such mortgage, their right being objected to in the answer. They should take out letters testamentary. *Porter v. Trall*, 106
5. Query, Whether a corporation can be an executor in New Jersey? *Id.*, 106

Executors and Administrators—Continued.

6. At law, one of two executors cannot sue his co-executor, but in equity he may. *Ransom v. Geer*, 249
 7. An executor cannot be permitted to conduct both sides of a litigation in which he has a personal interest adverse to the estate which he represents, and, in such a suit, he cannot be both a complainant and a defendant. *Id.*, 249
 8. Where a suit is brought against an executor, for a debt due from him to the estate, he should not be made a complainant, but should be made a defendant in the character in which he owes the debt. *Id.*, 249
 9. Proceedings in equity are conducted with less regard to mere form than proceedings at law. *Id.*, 249
 10. When a bill, in its premises, sets forth sufficient facts to show that the complainant is entitled to relief as an executor, or that the defendant is liable as an executor, it is not necessary that either should be so styled in the commencement or conclusion of the bill. *Id.*, 249
 11. Where a complainant is compelled, in stating his case, to show that he holds rights in the subject matter of the suit in two different characters, the court, in virtue of the facts upon which he gets a standing in court as a suitor, acquires jurisdiction over him for all purposes connected with the suit, and may, by its decree, settle and adjudge all his rights. *Id.*, 249
 12. Where there are two executors, and both seem to have been willing to do, and to have done, whatever was required, the commissions should be divided. *Squier v. Squier*, 627
- See* COSTS, 1; CREDITOR'S BILL; DEBTOR AND CREDITOR; EVIDENCE, 5; PARTIES, 2; POWERS, 1-3; TRUSTS, 3, 6, 7; USURY, 2.

Expert.

See EVIDENCE, 1.

F.**Fixtures.**

1. A deed for a brewery was given, and, at the same time, a separate bill of sale covering the steam-engine, beer-kettles, etc., then in the buildings and used therein, the avowed intention being to enable the purchasers to remove such fixtures, if they saw fit. A mortgage for part of the purchase-money, containing a description of the land only, was executed at the same time. After-

Fixtures—*Continued.*

wards, another mortgage, expressly including the fixtures mentioned in the bill of sale, was given, and a judgment was recovered against the purchasers, under which the fixtures were levied on.—*Held*, that, as between the first mortgagee and second mortgagee, and judgment creditor, the fixtures are not included in the first mortgage. *Zeller v. Adam*,

421

2. At the instances of mortgagees of the realty, the court set aside an order directing a receiver of an insolvent corporation to sell, as personal property, certain steam-engines, boilers, shafting, cupolas, radiators and a platform scale, because such articles were fixtures, and covered by the mortgage, not only from the adaptation of the buildings, etc. to their erection and use, but also because their severance would greatly depreciate their value and also that of the buildings to which they were attached, and would dismantle the buildings and take away from them essential adjuncts which were placed there to adapt them to the purpose for which they were built and used, and which, without them, they would not answer.—*Held*, also, that the fact that the owners of the premises had treated such fixtures as personalty, in making up their accounts, in insuring them and in rating them for taxation, could not control the question. *Watson v. Watson Manf. Co.*,

483

Fraud.

1. A bill which alleges that a feeble old man has, without consideration, transferred to his children all of his property, amounting to \$45,000, reserving to himself only an annuity of \$1,200, inadequately secured, and without any provision whatever for his wife in case she survive him; and that such transfer was obtained from him by want of comprehension on his part, and duress and false representations as to its effect on the part of his children, shows sufficient equity, and will, therefore, be sustained on general demurrer. *Frobasco v. Frobasco*,
2. Where representations were made by the holder of a mortgage for \$7,000, that he had sold the mortgaged premises to the mortgagor for about \$50,000; that it was first-rate property; that the land was good and the timber thereon valuable; that the land would be more valuable after it was cleared; that the mortgage was a good mortgage; and that the interest thereon had been paid regularly—all of which were false and fraudulent.—*Held*, that they

63

Fraud—Continued.

could not be regarded as *simplex commendatio*; and a conveyance of lands obtained thereby was set aside. *Perkins v. Partridge*, 82

3. A purchaser, who co-operates with the vendor in the misappropriation of purchase-money, which he knows was raised for the benefit of a third person, renders himself liable to the person defrauded to the extent of the fund misapplied with his connivance. *Bower v. Hadden Blue Stone Co.*, 171

See CONFUSION OF GOODS, 2; FRAUDULENT CONVEYANCES; INJUNCTION, 3; LIMITATIONS, 8; SPECIFIC PERFORMANCE, 3.

Frauds and Perjuries.

See CONVEYANCE, 1.

Fraudulent Conveyances.

1. A father, pending a compromise with his creditors, which included a mortgage on his homestead, gave a prior mortgage thereon to his daughter, to secure to her moneys alleged to have been advanced by her, and also for her services rendered in his family. The proofs as to the character of the loans and services, and also as to her *bona fides*, being unsatisfactory and contradictory, her mortgage was postponed to that of the creditors. *Miller v. Sauerbier*, 71
2. As to debts existing at the time a voluntary conveyance is made, the law raises a conclusive presumption of fraud, but a subsequent creditor can only impeach such a conveyance by showing fraud in fact. *Claffin v. Mess*, 211
3. A subsequent creditor may avoid a voluntary deed on the ground that it was made to defraud existing creditors, but, in order to do so, he must show debts still outstanding which existed when the deed alleged to be fraudulent was made. *Id.*, 211
4. Payment by a grantor of all his debts existing at the time he makes a voluntary conveyance, repels the idea that he thereby intended to defraud his creditors. *Id.*, 211
5. A deed which is fraudulent in fact as against creditors, may be avoided by subsequent as well as antecedent creditors. *Allaire v. Day*, 232
6. To sustain a conveyance, sought to be set aside because intended to defraud creditors, the consideration must be both good and *bona fide*. *Randall v. Vroom*, 353
7. A conveyance of an undivided half of a farm made by a debtor to his sisters (who owned the other undivided

Fraudulent Conveyances—Continued.

- half), three days after the service of a summons on him, the only consideration being their assumption of the encumbrances thereon, which were less in amount than the actual value of the debtor's interest,—*Held*, to fall within the rule, and the conveyance ordered to be set aside as against the creditor. *Id.*, 353
8. Conveyances by a debtor declared fraudulent as against a creditor. *Embury v. Klemm*, 517
9. A father bought a farm and caused it to be conveyed to his son by deed duly recorded. The son entered into possession of the property and lived upon it. After he went into possession, he contracted debts on the credit of his ownership of the farm. Subsequently, at his father's request, as they said, he conveyed the property to his father, without consideration, and on the allegation that the latter had never intended to give the farm to him, and that the son was not aware that the conveyance had been made to him.—*Held*, that the deed to the father was fraudulent as against the creditor. *Budd v. Atkinson*, 530
- See* CREDITOR'S BILL ; PARTIES, 3.

G.**Gift.**

See DONATIO CAUSA MORTIS: HUSBAND AND WIFE, 1-5; LEGACY, 9; PAYMENT.

H.**Husband and Wife.**

1. A gift by a wife to her husband is good, provided it be voluntary, and not the result of his craft or power. *Black v. Black*, 215
2. When a husband receives money belonging to his wife, the law presumes he receives it for her use, and she may recover on the strength of this presumption, unless he produces proof to rebut it. *Id.*, 215
3. A wife's money, expended by herself, or under her direction, on her husband's land, or in any other way for his use and benefit, in the absence of an agreement to repay, will be regarded as a gift. *Id.*, 215

Husband and Wife—Continued.

4. A gift by a wife to her husband may be proved by circumstances. *Id.*, 215
 5. Where a wife expends her money on the lands of her husband, in improving and adorning his home, equity will imply, independently of anything in the nature of a contract or promise, that she did so pursuant to an understanding that she was to be permitted to enjoy the benefits flowing from her expenditure, and if he wrongfully drives her from his house, equity will give her relief. *Id.*, 215
 6. A wife must live with her husband, and make his home hers, and give him her services, unless she can show that he has done something which relieves her from her duty to him. *Id.*, 215
 7. A wife who causelessly deserts her husband is not entitled to the aid of a court of equity in getting possession of such chattels as she has contributed to the furnishing and adorning of her husband's house. *Id.*, 215
 8. Equity will not lend its aid to the causeless disruption of family relations, or countenance unjustifiable disregard of the obligations of the marriage contract. *Id.*, 215
- See* CORPORATIONS, 2; CURTESY; DIVORCE; DOWER; DURESS; INJUNCTION, 1; PARTITION, 4; LEGACY, 2. 3; PARTNERSHIP, 1; PLEADING, 3; TRUSTS, 12.

I.**Injunction.**

1. A married woman is within the rule requiring a party defendant to rely solely on his own affidavit in case the complainant in an injunction bill relies only on his affidavit; nor can she avail herself of her husband's affidavit to support her answer, although he acted as her agent in the matter in controversy. *Bell v. Romaine*, 24
2. An attachment for violating an injunction granted on a bill to set aside a transfer of defendant's property, alleged to have been made by duress, refused, the proof not being satisfactory that the mortgage, which the defendant had collected, was included in the transfer. *Probasco v. Probasco*, 61
3. The bond given in this case, under the forty-sixth rule as it stood originally, upon issuing an injunction to restrain the further prosecution of certain attachment suits

Injunction—*Continued.*

(which had reached judgment) in West Virginia, was declared forfeited, it appearing that the complainant had no equity whatever, but had imposed upon this court by instituting a suit in which the West Virginia defendants were the real actors, and whose sole object was to defeat the judgment obtained against them in West Virginia.
Cook v. Chapman,

114

4. An order granting leave to bring an action at law on an injunction bond taken in this court, may be rescinded, if the equities of the parties were not considered at the time of its allowance. *Easton v. L. B. R. R.,* 236.
5. Where the facts on which the equity of a bill rests are positively and explicitly denied by the defendant on his personal knowledge, as a general rule the defendant is entitled to a dissolution of the injunction. *Stilt v. Hilton,* 579.
6. To exempt a case from the operation of the general rule, it must appear that a dissolution will deprive the party holding the injunction of all relief, in case he is finally successful, or that a dissolution will subject him to some other irreparable injury, or place him in a position of peculiar hardship. *Id.,* 579.
7. An order having been made that an injunction bond should be delivered to the obligees for prosecution, and a suit having been instituted thereon,—*Held,* that the order, although made without regard to the equities of the case, could not be rescinded except for equities shown, and on equitable terms. *Brown v. Easton,* 725.

See COSTS, 1; MORTGAGE, 1; MUNICIPAL CORPORATIONS, 1; PARTITION, 4.

Interest.

See LEGACY, 3, 6; PARTNERSHIP, 3; TRUSTS, 7; USURY.

J.**Judgment.**

See CORPORATIONS, 2; POWERS; SURETY, 1; TRUSTS, 3-7.

Jurisdiction.

1. Equity has jurisdiction (and for that purpose may enjoin the further prosecution of suits at law) in a case which involves the relative rights, under their charters, of two corporations to the use of the waters of the same stream.

Jurisdiction—*Continued.*

- or streams; and such jurisdiction exists on the ground of both public and private necessity. In such cases, equity is not only the appropriate forum, but the only one where adequate remedy in the premises can be administered. *Lehigh Valley R. R. v. Society &c.*, 145
2. A suitor, whose title is purely equitable, has no remedy at law, but must resort to equity. *Bower v. Hadden Blue Stone Co.*, 171
3. A court of equity will not sit as the divider of gains which are the proceeds of crimes or frauds involving moral turpitude. *Todd v. Rafferty*, 254
4. A court of equity must always aim to act upon broad principles of justice, disentangled as much as possible from little technicalities. *Ogden v. Thornton*, 569
- See* EXECUTORS, 9, 11; HUSBAND AND WIFE, 8; TRUSTS, 5.

L.**Laches.**

1. Great delay is a good bar in equity. *Stout v. Seabrook*, 187
2. A defendant applied to the court to open a decree for deficiency made against him in a foreclosure suit, the ground of the application being that he had been inveigled into signing a request to a solicitor to enter his appearance to the suit, which he had, as he alleged, signed in assurance of its character. He made no application for relief until after he had known of the decree for at least nine months, and after the evidence had all been taken under a creditor's bill, filed upon a decree against him and his father-in-law, to set aside conveyances made by him to the latter, and the cause which he defended had been set down for hearing.—*Held*, that he was barred by his laches. *Embury v. Klemm*, 517

See ACCOUNT, 1; NEW TRIAL.

Legacy.

1. T. gave to the children of D. a part of his residuary estate, to be equally divided *between* them as they should respectively come to the age of twenty-one years. At the time of making the will, and of T.'s death, D. had two children, but before the elder came of age another child was born, and all three are living, and the eldest has attained to majority.—*Held*, that each of the three chil-

Legacy—*Continued.*

- dren is entitled to an equal share, and that a contrary intention cannot be inferred from the testator's use of the preposition "between." *Ward v. Tomkins*, 3
2. Where a testator leaves real estate, of which his widow is dowerable, a legacy given to her in lieu of her dower, does not, as between legatees, abate on deficiency of assets, but is entitled to preference over other gifts merely voluntary. *Howard v. Francis*, 444
3. (1) Interest on a legacy given to a widow in lieu of dower is to be computed from one year after the testator's death; (2) interest on a legacy to a minor child, from the date of testator's death; (3) interest on a legacy to an adult child, from one year after such death; (4) on a legacy to grandchildren, from one year after such death. *Id.*, 444
4. A testator disposed of the residuum of his estate, and afterwards provided, by codicil, that any share that he then was, or thereafter might become entitled to, from the estate of his brother, should be taken as part of his residuary estate. By an agreement made in the testator's life-time, between his brother's residuary legatees, widow and next of kin, a certain share of his brother's estate was set off to the testator.—*Held*, that such share was vested, and must be held on the same trusts, etc. as the residuum. *Green v. Green*, 452
5. The will contained express directions that such trustees might keep any part of the trust fund invested in the stocks, etc. left by him and assigned by the executors to them, without liability for loss by depreciation.—*Held*, that this clause includes the stocks, etc. received by the testator on account of his brother's estate. *Id.*, 452
6. Where the interest on residuary personal estate is given to a legatee for life, without any direction as to accumulation, the interest which accrues thereon within the year next succeeding the testator's death, goes to the legatee for life, although the exact amount of the residuum is not then ascertainable, subject, of course, to the prior rights of creditors and legatees; nor is such right affected by the fact that the residuum is given to trustees instead of the interest being given directly to the legatee. *Id.*, 452
7. A testatrix gave to A. the interest on \$2,000 from the time of her death, provided A. survived B., and, in that event, after A.'s decease, the \$2,000 to be equally divided among A.'s children. But if A. did not survive B., then,

Legacy—*Continued.*

at A.'s death, the \$2,000, together with the accrued interest, was "to go to and be equally divided between all my nieces and my nephew W. and the children of my deceased nephew S." A. died before B., and between the time of testatrix's death and A.'s death certain of her nephews and nieces died, including W.—*Held*,

(1) That the interests of all of the nieces and of W., although contingent on the death of A. before B., vested at the decease of the testatrix, and, consequently, the shares of those deceased before A. were transmissible to their several next of kin.

(2) That the children of S. took *per capita* with testatrix's nieces and W.'s representative, no contrary intention appearing in the will. *Thornton v. Roberts*, 473

8. In construing a will, all doubts must be resolved in favor of the testator's having said exactly what he means. *Burnet v. Burnet*, 595

9. A gift to the children of A. and B. (they being persons who could not have offspring jointly) must be construed according to the plain grammatical sense of the words used, and constitutes a gift to B. himself and the children of A. *Id.*, 595

10. In construing a will, extrinsic evidence of the circumstances, situation and surroundings of the testator, and of his property, is admissible for the purpose of enabling the court to understand the meaning and application of the words he has used, but not for the purpose of showing an intention inconsistent with the words of the will. *Id.*, 595

11. Extrinsic evidence is also admissible in cases of latent ambiguity, where there are two or more persons or things exactly answering the person or thing described in the will. In such a case, parol evidence may be received of what the testator said, to show which of them he meant, but not to show that he meant a person or thing different from the one mentioned in the will. *Id.*, 595

12. Under a bequest or devise to a certain person, and to the children of a certain other person, the donees take *per capita* and not *per stirpes*. *Id.*, 595

13. Unless a contrary intention is manifested, all lapsed, void and illegal legacies fall into the residuum and pass as part of it, but this rule does not apply to the residue. If a gift of the residue, or any part of it fails, whether by

Legacy—Continued.

lapse, illegality or revocation, to the extent that it fails the will is inoperative, and the subject of the gift passes to the next of kin. *Id.*, 595

See EXECUTORS, 2, 3; MARSHALLING ASSETS, 1; PARTIES, 2; TRUSTS, 6, 7.

Lien.

1. A prior judgment creditor was made a party to a foreclosure bill, but, his judgment having been paid by a surety for the debt on which the judgment was recovered, he entered no appearance, and there was no proof before the master as to the amount due on the judgment, nor any direction in the final decree as to its payment.—*Held*, that, as to the surety, the priority and lien of the judgment were unaffected by the proceedings, and a petition by him to be made a party, in order to protect his rights, was dismissed. *Farmers Bank v. Lloyd*, 442
2. In 1872, complainants conveyed the fee of certain lands to a judgment debtor, whose father advanced the consideration. For improvements thereon afterwards made by the complainants, they received first a mortgage, and then a deed for the premises, to re-imburse them.—*Held*, that the lien of the judgment, which was obtained in 1867, was superior to their equitable rights in the premises. *Cook v. Bodine*, 470

See CORPORATIONS, 2; MUNICIPAL CORPORATIONS, 3, 4; PARTIES, 5; POWERS, 3; SOLICITOR; TAXES; TENANTS IN COMMON; VENDOR, 1.

Limitation of Actions.

1. When it clearly appears on the face of the bill that the complainant's right of action is barred, advantage may be taken of the statute of limitations by demurrer. *Partridge v. Wells*, 176
2. The bar of the statute is as perfect an answer in equity as at law, to actions covered by the statute. *Id.*, 176
3. The statute does not apply to such trusts as are not cognizable at law, and upon which a remedy can only be had in equity. *Id.*, 176
4. To render the lapse of the statutory period a bar to an action for an account by one partner against another, it must appear that the account has been closed for six years. *Stout v. Seabrook*, 187
5. The statute of limitations applies to actions of account between partners. *Todd v. Rafferty*, 254

Limitation of Actions—Continued.

6. Where the accounts between partners have been closed for six years, and there has been acquiescence for that period, without fraud, the statute constitutes a bar; but the statute affords no defence in a case where there have been dealings within six years. *Id.*, 254
7. The statute does not begin to run against each item of an account between partners, from the time it becomes a part of the account, but if part be within six years, it draws that which is before after it. *Id.*, 254
8. When the court assumes jurisdiction on the ground of fraud, the statute only begins to run from the discovery of the fraud. *Id.*, 254

Lunatics.

1. The return of an inquisition in lunacy set aside and a new commission ordered, after a personal examination of the lunatic. *Fitzgerald's Case*, 59

M.**Married Women.**

See HUSBAND AND WIFE.

Marshalling Assets.

1. A testator died in 1873, leaving a widow, a daughter, and three sons, Thomas, James and Michael. By his will, he devised the use of a lot (No. 183) to his widow, *durante viduitate*, with remainder to Thomas, subject to a legacy of \$1,000 to James, payable in five years after the widow's decease. He gave to James, besides the \$1,000, another legacy of \$4,000, charged on a lot (No. 185) devised to Michael, and payable in five or ten years, at Michael's option. He gave to Michael a lot (No. 185), subject to the legacy mentioned, and, also, a lot (No. 152), and the residuum of his estate to be applied to certain religious purposes. James died in 1873, after the testator, his legacies never having been paid. The testator's personal estate being insufficient to pay his debts, (including the costs of a litigation to establish the will, directed to be paid out of the estate), lot No. 185 was ordered to be sold for that purpose. The widow, in her own right, and also as administratrix of James, filed a bill for relief against that order.—*Held*, that the debts must be charged upon Thomas's residuary interest in No. 183, and on Michael's interest in Nos. 152 and 185, in the relative proportion

Marshalling Assets—Continued.

which the value of each lot bears to the amount of debts due, and that, in selling Michael's lot, No. 152 must be first resorted to, and if Thomas's remainder does not satisfy his proportion of the debts, the balance must be made out of Michael's property, and *vice versa*; and that the remainder, if any remain, arising from the sales of the several lots, will be subject to the legacies charged on the respective lots. *Martin v. Cullen*,

426

2. A mortgage and lease given to a wife as part of a family settlement, protected in equity by requiring payment out of the deceased husband's personal estate of a mortgage in suit for foreclosure, which, if foreclosed, would deprive her of her security. *Slack v. Emery*,

458

See DOWER; MORTGAGE, 2, 5-7.

Master and Servant.

See CORPORATIONS, 6, 8.

Maxims.

1. The application of the maxim, that he who asks equity must do equity, is not limited to any particular class of cases, but may be applied whenever it is necessary to the promotion of justice. *Mut. Ben. Life Insur. Co. v. Brown*, 193
 - He who comes into a court of equity, etc..... 118, 225, 710
 - In pari delicto*, etc..... 255
 - Vigilantibus et non dormientibus*, etc..... 191
 - Where one of two innocent persons must suffer, etc..... 245
- See* NEGLIGENCE, 4.

Mistake.

See ACCIDENT.

Mortgage.

1. A bond, secured by a mortgage, provided that on default in the payment of the interest thereon for thirty days after the same had become due, the principal should, at the option of the obligee, become payable.—*Held*, that after the obligee had ratified several parol extensions of the time for paying the interest, made by her agent, a subsequent similar extension would be deemed a waiver of the forfeiture, and a suit at law to enforce the bond on the ground of such forfeiture would be enjoined. *Bell v. Romaine*,
2. Where the grantee of a mortgagor conveys the mortgaged premises in different parcels, and the grantees of such parcels again convey them in parcels,—*Held*, that the grantees of the latter parcels are liable to pay the share

23

Mortgage—Continued.

of the mortgage debt chargeable on the part of the mortgaged premises of which the premises conveyed to them are part, in the inverse order of conveyance to them.

Hiles v. Coult,

40

3. After a bill to foreclose a mortgage has been filed, subsequent encumbrancers may be made parties by filing a petition instead of a supplemental bill. *Leveridge v. Marsh,*

59

4. Where the holder of a first mortgage has received ample collateral security for its payment, the rights of a subsequent mortgagee cannot be defeated by the assignment of the first mortgage to a party who had full notice and knowledge of such other encumbrance and the equity of the holder thereof in respect to such collateral security. *Bergen Sav. Bank v. Barrows,*

89

5. A mortgage held by J. B., covering several lots of land, had been reduced to \$7,400 at the time when the mortgagor sold an unreleased lot to M. & R., with full covenants of warranty &c., receiving therefor a mortgage. In order to obtain releases of some of the other lots, the mortgagor assigned to J. B. two other mortgages for \$6,500, and his own note for \$900. Afterwards, such mortgagor assigned to F. the M. & R. mortgage, representing to F. that it was a first mortgage. To secure another debt, the mortgagor and the complainants induced J. B. to assign to the complainants the \$7,400 mortgage, which was taken by them with notice and knowledge of the equity of F.—*Held*, that, as to the amount of the collaterals, \$6,500, the complainant's mortgage must be held to be satisfied as against F. *Id.*,

89

6. In 1856, Jacob Merselis bought a tract of land, consisting of a stone house and vacant lot, subject to Kipp's mortgage on the whole premises; in 1859, he and his wife, Jane, executed a mortgage to Lum on the whole tract; in 1867, Jacob, for a valuable consideration, conveyed the vacant lot to Jane; in 1870, he gave a mortgage on the stone house to Mandeville; and in 1873 he gave one on the stone house to Steele; in 1872, judgments were recovered against Jacob, under which his interest in the whole tract was purchased by Jane, who made the purchase at Steele's request, *ex benevolentia*, to protect his mortgage, and accordingly and for that purpose alone (the protection of his mortgage debt on the mortgaged premises), in 1873, Jacob and Jane gave a new mortgage

Mortgage—*Continued.*

- on the stone house to Steele, in lieu of his old one, and, afterwards, they gave one to Kimble (now Hamilton's) on the vacant lot.—*Held*, that Steele has no equity, as against Jane and Hamilton, to require Kipp and Lum to have recourse to the vacant lot, before resorting to the stone house, in order to satisfy their mortgages. *Kipp v. Merselis*, 99
7. Two lots, designated as 19 and 21, were mortgaged by R. to L., and represented by R. as having no prior encumbrance thereon. In fact, 19 was covered, together with other lots, by a prior mortgage, and was subsequently sold thereunder. R. promised to protect the equity of L. (who died before the foreclosure sale), and bought 19, accordingly, at that sale. After the delivery of the master's deed to R., he mortgaged 19 to E.—*Held*, that E. was chargeable with notice of the record of the foreclosure suit, from which it appeared that L.'s mortgage was not satisfied, and also, with notice of L.'s equity against R. by way of estoppel; and—*Held*, also, accordingly, that L.'s mortgage is prior to E.'s, but that in satisfying it 21 must be sold before 19. *Locker v. Riley*, 104
8. Where the owner of the equity of redemption pays off a mortgage with the funds of a third person, for the purpose of purchasing it for such third person, the mortgage will not be considered satisfied, either as to the owner or subsequent encumbrancers; *aliter*, if the mortgage is paid with money of the owner, though he may pay it for the purpose of repledging it. *Denton v. Cole*, 244
9. A mortgage may be assigned, in equity, by mere delivery, without writing. *Id.*, 244
10. A release of a grantee's assumption of a mortgage debt, given by an insolvent grantor after notice of foreclosure, without consideration, and for the sole and admitted purpose of defeating the mortgagee's claim for deficiency, is void in equity. *Trustees for Support of Public Schools v. Anderson*, 366
11. The liability of a grantee who assumes the payment of a mortgage on lands conveyed to him, depends upon the personal liability of his immediate grantor; therefore, if a grantor is not so liable, the mortgagee can not claim any deficiency from the grantee. *Norwood v. De Hart*, 412
12. In a foreclosure suit, the answers of some of the defendants admitted that the mortgagor made "some such bonds and mortgages" as two of those of the complainant stated in the bill—his second and third mortgage.—

Mortgage—*Continued.*

Held, that, as to those mortgages, this was such an admission as to render any proof, except the production of the instruments at the hearing, unnecessary. *Wills v. McKinney*,

465

13. The complainant derived title to the mortgages under a will and codicil thereto. The answer of the mortgagor did not deny the complainant's title to them, but did not expressly admit it. The answer of the other defendants admitted his title.—*Held*, that the complainant would be permitted to put in the second and third mortgages and the probate of the will and codicil as on the hearing. *Id.*, 465
14. A deed and a mortgage to the grantor to secure part of the purchase-money of the conveyance, were executed simultaneously on February 28th, and acknowledged and recorded on March 3d, at noon. Another mortgage on the same premises, to another person than the grantor, also stating that it was given to secure part of the purchase-money, was executed March 1st, and was acknowledged and registered March 3d, at a quarter before twelve o'clock, noon.—*Held*, that the first mortgage was entitled to priority, the registering of the second mortgage not being notice to the first mortgagee, the vendor, since at that time the vendee's deed had not been recorded. *Boyd v. Mundorf*,
- 545
15. Where the purchaser of land, encumbered by a mortgage, agrees to pay a particular sum as purchase-money, and, on the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, the purchaser is bound to pay the mortgage debt, whether he agreed to do so by express words or not. *Heid v. Vreeland*,
- 591
16. A mortgagee who takes possession of the lands mortgaged to him, either by himself or a tenant, is chargeable with a reasonable rent. *Dawson v. Drake*,
- 601
17. He is liable, whether he receives rent or profit or not; by taking possession he assumes the position of owner, and is therefore chargeable with the profit a provident owner could have made. *Id.*,
- 601
18. But actual possession, or a reception of the profits, or a fraudulent use of his power as mortgagee, to the loss of a subsequent encumbrancer, must be shown to render him liable. *Id.*,
- 601

See ACCIDENT, 1; AGENT; CORPORATIONS, 2, 3; COSTS, 2; DEBTOR AND CREDITOR; DOWER; ESTOPPEL, 1; EXECUTORS, 4;

Mortgage—Continued.

FIXTURES MARSHALLING ASSETS, 2; LIEN; PARTIES, 4, 6;
PLEADING, 3, 4; RECEIVERS, 2-4; SET OFF; TAXES, 1, 2,
6, 8, 9.

Municipal Corporations.

1. A city took land, by proceedings in condemnation, under its charter, for a street, and entered into possession and built a sewer therein, but did not pay the price awarded; the owner subsequently brought ejectment and recovered judgment, and obtained a *hab. fac. poss.*—*Held*, that the city was entitled to equitable relief, and an injunction was awarded on terms of payment of the award and interest, and costs of the ejectment. *Jersey City v. Fitzpatrick*, 97
 2. A board of public works of a city is not justified in refusing to supply water for the use of the engines, etc. of a railroad being operated by a receiver under the direction of the court, on the ground that certain water rents, which were due when the railroad was declared insolvent, are unpaid. *Coe v. New Jersey Midland R. R. Co.*, 440
 3. The reports of commissioners of re-assessments made under the act of 1873 (*P. L.* 1873, p. 442), were relied on in this case. While fatally defective in other respects, they did not even show that the commissioners determined the amount of the assessments on each lot.—*Held*, that they constituted no lien. *Lembeck v. Jersey City*, 554
 4. The legislature has no power to fasten upon any lot an unconstitutional assessment, by a statutory limitation as to the time or mode in which the owner must object thereto. *Id.*, 554
 5. Provisions in a city charter, inconsistent with amendments to the constitution of the state afterwards adopted, are void. *Trustees of Public Schools v. Taylor*, 618
- See* QUIA TIMET, 3; TAXES, 2-8.

Multiplicity of Suits.

See JURISDICTION, 1; QUIA TIMET.

N.**Negligence.**

1. Negligence by a railroad company does not relieve a person attempting to cross its track from the duty of exercising ordinary care and prudence. *Blaker v. New Jersey Midland R. R. Co.*, 240

Negligence—*Continued.*

2. When a person is killed by collision with a locomotive, if it appears that his carelessness materially contributed to the disaster, his next of kin have no right to damages. *Id.*, 240
3. A person approaching a railroad crossing is bound to look and listen, and if he fails to do so, and injury ensues, he is without remedy ; or if, using his eyes and ears, he sees or hears an approaching train, and foolishly tries the experiment of crossing in advance of it, and fails, his failure will be esteemed his own fault. *Id.*, 240
4. It is a rule of equity that, where one of two innocent persons must suffer, he must bear the loss who, by his negligence, has made injury to the one or the other possible. *Denton v. Cole*, 245
5. A person who is injured by a collision with a railroad train, is not entitled to damages if it appears that his negligence was the proximate cause of the collision, or materially contributed in producing it. *Palys v. Erie R. R. Co.*, 604
6. Contributory negligence is such want of care as materially helps in producing the disaster. *Id.*, 604
7. A person who attempts to cross a railroad when he knows a train is due, and that he cannot make the passage in safety if the slightest delay or mishap occurs to him, is guilty of negligence, and if he is injured by a collision has no right to damages. *Id.*, 604

New Trial.

1. A complainant sought to obtain a new trial in equity on the ground that the attorney of the plaintiffs in the suit at law (the defendants in this court), fraudulently concealed a written agreement, which, it was insisted, materially affected the plaintiffs' claim, to the great advantage of the defendants. It appeared that, before the suit was commenced, the plaintiffs' attorney handed the agreement to the defendants' attorney (not the counsel who tried the cause for them, however), for examination. It appeared, also, that the person who negotiated the transaction (an advance of money) which resulted in the agreement, and who made the agreement, and who professed to have been acting therein as the agent of the defendants, was a witness for the plaintiffs ; that he was accessible to the defendants and their counsel, both before and at the time of the trial, but they did not examine him on the subject of the existence of the agreement, or

New Trial—Continued.

of any such agreement. Such examination was to be expected, because the defendants claimed that in the transaction the witness acted for himself, and not for the defendants. It appeared, also, that there was no concealment on the part of the plaintiffs of the character of their demand.—*Held*, that, under the circumstances, the complainants had no claim to relief. *Cairo & Fulton R. Co. v. Titus*,

502

See REVIEW.

Notice.

See CORPORATIONS, 5; ESTOPPEL, 2; MORTGAGE, 4, 7; POSSESSION; POWERS, 4; SOLICITOR.

O.**Orphans Court.**

1. An application by a caveator, (under *Rev.*, *Orphans Court*, p. 756, § 19, which provides that the orphans court may, on the application of a caveator or executor, certify the questions raised by any *caveat* into the circuit court of the county, for trial before a jury), was not made until after all the testamentary witnesses had been examined on the part of the proponents.—*Held*, that it was too late. *Sutton v. Morgan*,

629

2. The time limited by order of the orphans court, within which the creditors of an insolvent estate must present their claims or be barred, cannot, after the expiration of such time, and after notice has been given pursuant to the direction of the statute, be extended by a subsequent order. *Stelle v. Conover*,

340

P.**Parent and Child.**

1. From the mere fact that a child renders service to a parent, the law will not imply a promise to pay. As between them, an express promise must be shown, or circumstances from which a promise must necessarily be implied. *Smith v. Smith*,

564

See FRAUDULENT CONVEYANCES, 1, 9.

Parties.

1. On a bill to set aside a transfer of property, alleged to have been obtained by duress, persons in whose favor certain

Parties—Continued.

charges on the lands thereby conveyed were made, are necessary parties. *Probasco v. Probasco*,

63

2. A testator gave to his wife \$5,000, to his son \$1,000, and to A. and B. other legacies, and the income, use and profits of all the residue to his wife for life, with remainder to his son, subject to the payment of a legacy of \$1,000 to his daughter. He appointed his wife and M. executors. They proved the will, settled the estate, and had their final account passed. There remained about \$13,000 of personalty, subject to \$1,000 advanced by the widow to pay the debts of the estate, and real estate worth \$13,000. The complainant (the widow) files her bill to set aside a conveyance of her life interest in the real estate, made to her son by means of his importunity, deceit and duress, and also to have returned to her custody and accounted for, the personalty of which he has also taken possession.—*Held*, on demurrer to the bill—

(1) That the bill is not multifarious.

(2) That M. (the co-executor) is not a necessary party, the estate being settled and the executors' final account passed.

(3) That A. and B. and the daughter are not necessary parties, the remedy of the former, if their legacies are unpaid, being against the executors, and that of the daughter being against the son, whose estate in remainder is charged therewith. *Danner v. Danner*,

67

3. An assignee in bankruptcy may sue in this court to recover property conveyed by the debtor to defraud his creditors. *Johnson v. Helmstaedter*,

124

4. A person who was a member of a partnership when a mortgage was given to the firm (but in the name of one partner only), and also when advances were afterwards made thereon by the firm, and when the bill was filed, ought to be a party to a suit for its foreclosure. *De Greiff v. Wilson*,

435

5. Certain commissioners, authorized by statute, made a contract for the improvement of a public road, with M. & N., who gave sureties for its faithful execution. Afterwards, with the commissioners' approval, M. assigned his interest to N., who, before the work was finished, made an assignment to G. for the benefit of his creditors. The sureties of M. & N., by a subsequent, independent contract with the commissioners, completed the work. By the original contract it was provided that so much of the

Parties—Continued.

money due the contractors under it as might be considered necessary by the commissioners, would be retained by them until any suits or claims against them for damages or for arrears in payment to workmen, or for material furnished, should have been settled and evidence to that effect furnished to the commissioners. G. filed a bill against the commissioners for an account, discovery etc., to which they put in a demurrer, because the sureties of M. & N., and also persons holding claims against N. for labor or materials furnished on the work, had not been made parties.—*Held*, that none of them being necessary or even proper parties, the demurrer should be overruled. *Grassmann v. Bonn*,

490

6. A plaintiff in attachment claiming a lien on a mortgage debt by virtue of his attachment, is a necessary party defendant to a bill to foreclose such mortgage. *Pine v. Shannon*,

501

See CORPORATIONS, 4; LIEN, 2; EXECUTORS, 4, 6-8; MORTGAGE, 3; PARTITION, 4; PRACTICE, 5, 6; SETTING ASIDE SALES, 2.

Partition.

1. If a partition be prayed, and all the parties (all being *sui juris*) agree as to the divisibility of the premises, it may be ordered, although the master reports adversely. Lands not described in the bill must not be included in the master's report. A survey of the premises will not be ordered unless shown to be clearly necessary. Where the master was required to report a description of the premises to be divided, a statement that the lots are Nos., &c., giving the numbers on the map on a city atlas, without more or further description, is insufficient. He should describe them. *Barnes v. Taylor*,

7

2. A *bona fide* division of the residue of an estate, consisting of both realty and personalty, as authorized by a will, is binding on the parties and all others interested. *Ward v. Kitchen*,

31

3. In a partition of lands, in equity, between one tenant in common and the purchaser of his co-tenant's share under an execution at law, where the co-tenant has wasted part of the land before the sheriff's sale, the part so wasted must be set off to such purchaser. *Polhemus v. Emson*,

405

4. By a will proved in 1846, a devise of certain limestone quarries was made to testator's daughter, for life, with remainder to her four daughters in fee. Under a lease from the

Partition—*Continued.*

life-tenant, given in January, 1876, for the term of three years, the husband of one of her daughters went into possession of and worked the quarries. The life-tenant died in September, 1877. On a bill for a partition of the quarries, filed by three of the daughters and their husbands against the fourth,—*Held*,

(1) That the husband of the fourth daughter (who claimed possession under the lease, notwithstanding the life-tenant's death) was a proper party.

(2) That, by virtue of his interest as husband, he might be enjoined from wasting the premises, as if he, and not his wife, were a tenant in common.

(3) That sufficient grounds for the appointment of a receiver existed.

(4) That an account against such husband could not be maintained in that suit. *Weise v. Welsh*, 431

See TENANTS IN COMMON.

Partnership.

1. Property purchased by one copartner with the funds of the firm, and title taken in the name of his wife, is partnership assets. *Partridge v. Wells*, 176

2. Profits made secretly by one of two partners, in the business of the firm, are partnership property. *Todd v. Rafferty*, 254

3. One of three partners who declines to pay over a sum claimed by each of his other partners, cannot relieve himself from paying interest thereon pending the adjustment of the claim, if it appear that he has meanwhile used the money for his own purposes. *Coddington v. Idell*, 540

See ACCOUNT, 1, 2; CORPORATIONS, 2; DOWER; LIMITATIONS, 4-8; PARTIES, 4.

Payment.

1. The delivery of a note by the holder to the maker, with intent thereby to discharge the debt, does discharge it. *Vanderbeck v. Vanderbeck*, 265

See FRAUDULENT CONVEYANCES, 4; MORTGAGE, 8.

Pleading.

1. In pleading, a statement of matters of fact in the form of charge, is sufficient, on general demurrer, where it is evident that a statement by way of allegation or averment was intended by the pleader. *Johnson v. Helmstaedter*, 124

Pleading—*Continued.*

2. A complainant cannot make one case by his bill, and another by his proofs, and still have a decree. *Lehigh Valley R. R. v. McFarlan*, 180
 3. On a bill to foreclose a mortgage belonging to a wife, a mere averment that the owner of the premises falsely alleges that it is unsafe for him to pay the amount of the mortgaged debt, because of a foreign attachment issued against complainant's husband, without stating any connection between the attachment proceedings and the mortgage, is insufficient. *Pine v. Shannon*, 404
 4. On foreclosure of a mortgage, given to the trustees for the support of public schools of New Jersey, on May 31st, 1875, on lands in the city of Trenton, the answer of the city set up that the assessments for taxes for that year were laid between the first Monday in May and the last Monday in June, 1875 (the period designated by the charter). There being no proof that the assessment was actually made before the mortgage was given,—*Held*, that such inference could not be drawn from the answer. *Trustees of Public Schools v. Taylor*, 625
- See* CORPORATIONS, 5; EXECUTORS, 10; EVIDENCE, 9; LIMITATIONS, 1; MORTGAGE, 3, 12, 13; PARTIES, 2, 5; SETTING ASIDE SALES, 2; USURY, 1.

Possession.

1. The principle that the possession of land is notice to others of the possessor's title, is intended to protect only equitable rights, and not to cover the possessor's fraud, or to protect him where he is without equity. *Groton Sav. Bank v. Batty*, 126.
- See* CORPORATIONS, 2; MORTGAGE, 16, 18.

Powers.

1. A testator, after directing all his debts to be paid, gave to each of his six children an equal share of all of his estate, the shares of his two daughters to be invested for their use during life, with remainder to their respective heirs. After appointing his son W. his sole executor, he concluded as follows: "My will and wish is to consult the heirs whether it will be best to sell it or otherwise—the homestead property."—*Held*, that a power of sale of the real estate vested in the executor, from his duty to divide the estate and invest the daughters' shares, and also from the condition of the estate, there being insufficient personalty to pay the debts, and the sons being

Powers—Continued.

unable to pay their debts to the testator except from their several shares of the realty.—*Held*, also, that the executor's power of sale over the homestead is not dependent upon obtaining the consent of all the heirs.

Haggerty v. Lanterman,

37

2. Executors vested with absolute power to sell real estate, are authorized to do all that is necessary in the way of insurance, superintendence, repairs and taxes, to preserve the property until sale. *Howard v. Francis*, 444
3. Where a testator, by his will, gave the residue of his estate to his widow *durante viduitate*, and directed that, after she should cease to be his widow, his executors should sell his estate, real and personal, remaining, and gave the proceeds of the sale to such of his children as should then be living, in equal shares,—*Held*, that the interest of the children in the land was subject to the power of sale, and that the power was not liable to be defeated by one or more (less than the whole number) of the beneficiaries thereunder, to the prejudice of the others, or any of them, and that, after the sale, it was too late to exercise the power of election. Therefore, that the purchaser of the real estate at the executor's sale took title clear of a levy under an execution on a judgment against one of the children. *Bolton v. Stretch*, 536
4. A notice given by the sheriff to the executor, that he held an execution on the judgment, and had made a levy thereunder, when, in fact, no execution had been delivered to him,—*Held*, not to be notice of the execution. It was a notification of the alleged existence of facts which really had no existence, and was, therefore, of no importance, and imposed no duty on the executors. *Id.*, 536

Practice.

1. A demurrer to a bill was overruled. The complainant thereupon took an order to amend his bill, which order required the service of the amended bill on the defendant. That order was never served. The demurring defendant took no copy of the bill from the clerk's office. After the taking of that order, another order was taken by the complainant, stating the amendments and providing that the bill stand amended on the order. This order was duly served. Subsequently, on the death of another defendant, another order of amendment, by way of revivor, was taken. This order was served on

Practice—*Continued.*

- the demurring defendant's solicitor. It contained a direction to answer in twenty days. No answer was at any time filed by the demurring defendant. A decree *pro confesso* was taken against him, after the expiration of the twenty days. On petition to open this decree,—*Held*, that the demurring defendant was bound by the statute to answer, without order to that effect, in forty days from the overruling of the demurrer, and that his duty in this respect was not affected by the existence of the first order, which was never served. *Vanderbeck v. Perry*, 78
2. It not appearing that the defendant has a meritorious defence, the misapprehension of his solicitor as to his duty to file an answer is, in itself, no ground for relief. *Id.*, 78
3. A final decree, made on hearing, in a case where the defendant's counsel failed to appear at the hearing, and also failed to lay before the court the evidence taken on behalf of the defendant, will not be set aside, if it appears the same judgment must have been pronounced had the defendant's proofs been submitted and considered at the hearing. *Allaire v. Day*, 231
4. A final decree, which is clearly right upon a full consideration of the whole case, will not be set aside merely to afford the defendant an opportunity to be heard on final hearing. *Id.*, 231
5. After a final decree on a default, and an order to account had been entered on a bill to redeem certain securities, the defendant was adjudged a bankrupt, and an assignee appointed.—*Held*, that the suit was not thereby abated; that it was not the duty of the complainants to make such assignee a party, but that if the assignee desired to appear in the suit it was his duty to apply for leave to be substituted for the defendant.—*Held*, also, accordingly, that he was bound by the proceedings. *Esterbrook Co. v. Ahern*, 341
6. A petition, filed by a stranger to the suit, claiming the payment of moneys paid into court in the cause, to satisfy a judgment recovered by him against the defendant in a foreign state, dismissed on the ground that the petitioner, not being a party to the suit, had no standing, and could have no relief therein, and that the proceeding for the purpose should be by bill. *Id.*, 341
- See* ACCOUNT, 2; EVIDENCE, 8; LIEN, 2; LUNATICS; PARTITION, 1.

Powers—Continued.

- unable to pay their debts to the testator except from their several shares of the realty.—*Held*, also, that the executor's power of sale over the homestead is not dependent upon obtaining the consent of all the heirs. *Haggerty v. Lanterman*, 37
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Practice—Continued.

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2. It not appearing that the defendant has a meritorious defence, the misapprehension of his solicitor as to his duty to file an answer is, in itself, no ground for relief. *Id.*, 78

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4. A final decree, which is clearly right upon a full consideration of the whole case, will not be set aside merely to afford the defendant an opportunity to be heard on final hearing. *Id.*, 231

5. After a final decree on a default, and an order to account had been entered on a bill to redeem certain securities, the defendant was adjudged a bankrupt, and an assignee appointed.—*Held*, that the suit was not thereby abated; that it was not the duty of the complainants to make such assignee a party, but that if the assignee desired to appear in the suit it was his duty to apply for leave to be substituted for the defendant.—*Held*, also, accordingly, that he was bound by the proceedings. *Esterbrook Co. v. Ahern*, 341

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See ACCOUNT, 2; EVIDENCE, 8; LIEN, 2; LUNATICS; PARTITION, 1.

Powers—*Continued.*

- unable to pay their debts to the testator except from their several shares of the realty.—*Held*, also, that the executor's power of sale over the homestead is not dependent upon obtaining the consent of all the heirs.
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3. Where a testator, by his will, gave the residue of his estate to his widow *durante viduitate*, and directed that, after she should cease to be his widow, his executors should sell his estate, real and personal, remaining, and gave the proceeds of the sale to such of his children as should then be living, in equal shares,—*Held*, that the interest of the children in the land was subject to the power of sale, and that the power was not liable to be defeated by one or more (less than the whole number) of the beneficiaries thereunder, to the prejudice of the others, or any of them, and that, after the sale, it was too late to exercise the power of election. Therefore, that the purchaser of the real estate at the executor's sale took title clear of a levy under an execution on a judgment against one of the children. *Bolton v. Stretch*, 536
4. A notice given by the sheriff to the executor, that he held an execution on the judgment, and had made a levy thereunder, when, in fact, no execution had been delivered to him,—*Held*, not to be notice of the execution. It was a notification of the alleged existence of facts which really had no existence, and was, therefore, of no importance, and imposed no duty on the executors. *Id.*, 536

Practice.

1. A demurrer to a bill was overruled. The complainant thereupon took an order to amend his bill, which order required the service of the amended bill on the defendant. That order was never served. The demurring defendant took no copy of the bill from the clerk's office. After the taking of that order, another order was taken by the complainant, stating the amendments and providing that the bill stand amended on the order. This order was duly served. Subsequently, on the death of another defendant, another order of amendment, by way of revivor, was taken. This order was served on

Practice—Continued.

the demurring defendant's solicitor. It contained a direction to answer in twenty days. No answer was at any time filed by the demurring defendant. A decree *pro confesso* was taken against him, after the expiration of the twenty days. On petition to open this decree,—*Held*, that the demurring defendant was bound by the statute to answer, without order to that effect, in forty days from the overruling of the demurrer, and that his duty in this respect was not affected by the existence of the first order, which was never served. *Vanderbeck v. Perry*, 78

2. It not appearing that the defendant has a meritorious defence, the misapprehension of his solicitor as to his duty to file an answer is, in itself, no ground for relief. *Id.*, 78

3. A final decree, made on hearing, in a case where the defendant's counsel failed to appear at the hearing, and also failed to lay before the court the evidence taken on behalf of the defendant, will not be set aside, if it appears the same judgment must have been pronounced had the defendant's proofs been submitted and considered at the hearing. *Allaire v. Day*, 231

4. A final decree, which is clearly right upon a full consideration of the whole case, will not be set aside merely to afford the defendant an opportunity to be heard on final hearing. *Id.*, 231

5. After a final decree on a default, and an order to account had been entered on a bill to redeem certain securities, the defendant was adjudged a bankrupt, and an assignee appointed.—*Held*, that the suit was not thereby abated; that it was not the duty of the complainants to make such assignee a party, but that if the assignee desired to appear in the suit it was his duty to apply for leave to be substituted for the defendant.—*Held*, also, accordingly, that he was bound by the proceedings. *Esterbrook Co. v. Ahern*, 341

6. A petition, filed by a stranger to the suit, claiming the payment of moneys paid into court in the cause, to satisfy a judgment recovered by him against the defendant in a foreign state, dismissed on the ground that the petitioner, not being a party to the suit, had no standing, and could have no relief therein, and that the proceeding for the purpose should be by bill. *Id.*, 341

See ACCOUNT, 2; EVIDENCE, 8; LIEN, 2; LUNATICS; PARTITION, 1.

Rules of Chancery.

Rule 46, <i>Cook v. Chapman</i>	114
Rule 46, <i>Brown v. Eastman</i>	725

S.**Sales of Land.**

1. Where the sheriff, in advertising a sale under foreclosure, duly stated the title of the suit, and described the premises, but added, "seized and taken as the property of W. L. *et ux. et al.*, and taken in execution at the suit of J. B." (W. L. was not the owner of the fee, but the lessee),—*Held*, that this statement did not vitiate the advertisement. *Bowlby v. Lott*,

1

See SETTING ASIDE SALES; VENDOR.

Savings Banks.

1. Under *P. L.* 1878, p. 393, construed in connection with *P. L.* 1876, p. 341, a savings bank cannot divide more than five per cent. per annum among its depositors, until after its surplus exceeds fifteen per cent. of its deposits. *Provident Sav. Inst. Case*,

5

Setting Aside Sales.

1. A deed to purchasers under a judgment and sale made by an auditor in attachment, cannot be avoided on the ground of false claims by creditors, and an irregular, fraudulent and inadequate sale, without making the creditors and auditor parties. *Wilson v. Bellows*,
- 282
2. This defect, in not joining proper parties, is good ground for demurrer, where it appears on the face of the bill. *Id.*,
- 282
3. When the purchasers are not charged with fraud, relief against them will only be granted on equitable terms; such as offering to refund the purchase-money. They will not be compelled to look to others who are not parties to the bill. *Id.*,
- 282
4. A sale of lands under foreclosure to the mortgagee was set aside, and the mortgagor let in to answer, where it appeared that the mortgagor was a very old and infirm woman, depending on her daughter to attend to her affairs, and that the daughter had used diligence, both in employing counsel at the commencement of the suit, and after it was ascertained that her solicitor had neglected to defend the action, which she learned only after

Setting Aside Sales—Continued

the property had been advertised for sale, the surprise being proved, and the question of merits appearing to be an open one. *Carpenter v. Smith*, 463

5. A sheriff was directed by complainants' solicitor to stop the advertisement of a sale under foreclosure, because an injunction restraining such sale had issued out of a federal court. The sheriff nevertheless continued to adjourn the sale from week to week for nearly three years, no notice of such adjournments being given, or required to be given by statute, in any newspaper. After the injunction was dissolved, and without any further or other notice to subsequent encumbrancers or other parties in interest, he sold the premises, realizing an amount far below their value.—*Held*, that the sheriff's action in the adjournments could not, under the circumstances, be regarded as a substantial compliance with the statute, and that there was such surprise on the parties interested, by reason of want of notice, and such consequent injury to their rights, as justified the court in setting aside the sale on terms. *Trustees of Public Schools v. New Jersey West Line R. R.*, 494

6. One of a number of bondholders who had entered into an agreement for the purchase of the mortgaged premises at the sale under the execution in the foreclosure proceedings, applied for an order setting aside the sale (the property had been bought by the combination at the sale) on the ground that the purchasing committee of the combination had, contrary to the agreement under which the combination was formed (that is, after the time limited in the agreement for coming in), let in other bondholders; also, that they had stifled competition at the sale by purchasing, after an adjournment of the sale and before the sale took place, for the account of a railroad company which came in subsequently and after the limited time, the bonds of a person who was a determined bidder when the property was first put up for sale.—*Held*, that the objection that other bondholders were let into participation in the benefits of the combination agreement after the time limited therein, could not, under the circumstances, find favor in equity, and that the alleged stifling of competition was the act of the agents of the petitioner, and it did not appear that it had affected his interest injuriously in any way. *Walker v. Montclair and Greenwood Lake R. R. Co.*, 525

Set Off.

1. F. gave a mortgage to W., who assigned it to J. and E. While J. and E. owned it, F. purchased of the payee a note made by E. F. sold the premises to P., on February 28th, 1878, deducting the amount of the note from the mortgage, as part of the purchase-money. E. assigned her interest in the mortgage, on April 11th, 1878, to J. On foreclosure by J., and prayer for deficiency against F.,—*Held*, that neither F. nor P. was entitled to set off the amount of the note against the mortgage. *Williamson v. Fox*,

488

Sheriffs.

1. By the act of 1871 (*Rev.* p. 410), sheriffs were, for their services, allowed to add twenty-five per cent. to their fees, so long as the United States bankrupt act should remain in effect. By the act of 1877 (*Rev.* p. 1335), the act of 1871 was repealed, but with a proviso that the repealer should not affect or in anywise interfere with the fees of any sheriff who might be in office when such repealer took effect.—*Held*, that a sheriff who was in office at that time is not entitled to the additional twenty-five per cent. for services since September 1st, 1878. The act of 1871 expired by its own limitation at that date (September 1st, 1878), when the bankrupt law was repealed. *American Ins. Co. v. Andrew*,

87

See COSTS, 2; POWERS, 4; SALES OF LAND, 1; SETTING ASIDE SALES, 5.

Solicitor.

1. A decree directed the payment of certain moneys to the complainants therein, as to some of them to them or to their solicitor, and as to the other to her. The complainants' solicitor served on the solicitor of the defendants a copy of the decree, with a notice endorsed thereon, that he had a lien on the moneys therein directed to be paid. The defendants' solicitor, concluding that the complainants' solicitor had, in fact, no claim upon the money, paid it over to the complainants.—*Held*, that the defendants were liable for the amount of the lien of the complainants' solicitor for services and disbursements; and that a reference should be ordered to ascertain the amount of such lien, etc. *Barnes v. Taylor*,

467

See NEW TRIAL; PRACTICE, 2; SETTING ASIDE SALES, 4; USURY, 3.

Specific Performance.

1. Specific performance was refused of a contract to build and equip a railroad, although the contract price was to

Specific Performance—Continued.

be paid in the stock and bonds of the company, and the estimates, &c., were to be made by the company. The company declared its inability to comply with the requirements of a supplement to the act (a general law) under which it was incorporated, and the penalty for non-compliance therewith was, by the supplement, declared to be the forfeiture of its charter. It therefore, and merely for that reason, declined to proceed further under the contract. *Danforth v. Phila. & Cape May R. R.*, 12

2. The court refused to consider the constitutionality of such supplement, so far as the defendants were concerned, and also refused to direct them to make estimates for the work already done under the contract. *Id.*, 12

3. A person agreed to exchange his farm for city lots, but made no effort to ascertain their value, and there was no misrepresentation by their owner. On a bill for specific performance, he set up as a defence that they were worth less than he supposed. Their value not being so inadequate as to be evidence of fraud,—*Held*, that the defence could not prevail. *Shaddle v. Disborough*, 370

See CORPORATIONS, 2.

State.

1. Independently of any doctrine founded on the notion of prerogative, as a matter of construction, it must be clear, from the nature of the mischiefs to be reached, or the language used, that the government was in the contemplation of the legislature, before a court would be authorized to put a construction on a statute which would affect the rights of the state. *Trustees &c. v. Trenton*, 667

See COMITY; PREROGATIVE; TAXES, 2, 6–9.

Statutes.

See CONSTITUTION; CORPORATIONS, 5; SPECIFIC PERFORMANCE, 1, 2; STATE; TRUSTS, 5.

Statute of Frauds.

See FRAUDS AND PERJURIES.

Statute of Limitations.

See LIMITATION OF ACTIONS.

Statutes of New Jersey.

Chancery, <i>Rev.</i> p. 108, § 25.....	81
<i>Rev.</i> p. 110, § 41.....	60
<i>Rev.</i> p. 118, § 78.....	60
<i>Rev.</i> p. 120, § 88.....	645

Statutes of New Jersey—Continued.

Corporations,	<i>Rev.</i> p. 175.....	480
	<i>Rev.</i> p. 188, § 63.....	588
	<i>Rev.</i> p. 195, § 99.....	410
	<i>Rev.</i> p. 1289, § 23.....	480
	<i>Nix. Dig.</i> p. 534, § 19.....	479
	<i>P. L.</i> 1872, p. 1379.....	491
Death,	<i>Rev.</i> p. 294.....	240
Dower,	<i>Pat.</i> 343.....	695
Escheats,	<i>Elm. Dig.</i> 162.....	685
Evidence,	<i>Rev.</i> p. 378, § 3.....	577
	<i>Rev.</i> p. 378, § 4.....	193, 542
	<i>Rev.</i> p. 379, § 6.....	578
	<i>Rev.</i> p. 381, § 19.....	201
Executions,	<i>Rev.</i> p. 389.....	44
	<i>Rev.</i> p. 393.....	646
Fees and Costs,	<i>P. L.</i> 1871, p. 410.....	87
	<i>P. L.</i> 1877, p. 1335.....	87
Frauds and Perjuries,	<i>Rev.</i> p. 444, § 1.....	202
Interest,	<i>Rev.</i> p. 519.....	611
Jersey City,	<i>P. L.</i> 1873, p. 442.....	554
Legacies,	<i>Rev.</i> p. 581, § 1.....	666
Liens,	<i>Rev.</i> p. 586.....	111
Orphans Court,	<i>Rev.</i> p. 757, § 24.....	107
	<i>Rev.</i> p. 770, § 82.....	641
Quiet Titles,	<i>Rev.</i> p. 1189.....	554
Railroads,	<i>P. L.</i> 1878, p. 22.....	16
Sale of Land,	<i>Rev.</i> p. 1042, § 3.....	499
Savings Banks,	<i>P. L.</i> 1871, p. 410.....	87
	<i>P. L.</i> 1877, p. 1335.....	87
Taxes,	<i>Rev.</i> p. 1165, § 122.....	621
Trenton,	<i>P. L.</i> 1874, p. 331.....	619, 674
Wills,	<i>Rev.</i> p. 1244, § 4.....	596

Statutes of Great Britain.

13 <i>Eliz.</i> c. 7, § 12.....	660
5 <i>Geo. II</i> , c. 30, § 1.....	660
6 <i>Geo. IV</i> , c. 16, § 63.....	660
7 <i>Geo. IV</i> , c. 57, § 11.....	660
3 & 4 <i>Wm. IV</i> , c. 105.....	696
1 & 2 <i>Vic.</i> c. 100, § 14.....	660
1 & 2 <i>Vic.</i> c. 110.....	659
27 & 28 <i>Vic.</i> c. 112.....	659

Subrogation.

See TAXES, 1.

Surety.

1. A judgment recovered against a principal alone is, as a general rule, as against the surety, evidence of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment. *De Greiff v. Wilson*, 435
 2. A creditor is entitled to the benefit of all collateral obligations held for the payment of his debt by any person liable to him as surety. *Heid v. Vreeland*, 591
- See* CREDITOR'S BILL; PARTIES, 5.

Surprise.

See SETTING ASIDE SALES, 4, 5.

T.**Taxes.**

1. The holder of a first mortgage discovering, during foreclosure, that certain taxes were a lien on the premises, paramount to all encumbrances, entered into an agreement, through his solicitor, with the solicitor of a second mortgagee, that if he, the first mortgagee, would pay the taxes, and the second mortgagee should buy the premises at the foreclosure sale, he should be repaid by the second mortgagee. After such payment, sale and purchase, the second mortgagee refused to refund the amount of the taxes.—*Held*, that the first mortgagee could not be subrogated to the original lien of the township for the taxes, and have the amount paid by him decreed a lien on the lands. *Manning v. Tuthill*, 28
2. Moneys belonging to the state can not be taxed by a municipal corporation, and hence the lien of mortgages given by a citizen to the trustees for the support of public schools, or to the chancellor, in his official capacity, cannot be subordinated to the lien of municipal taxes assessed on the mortgaged premises after such mortgages were given, notwithstanding the charter declares that such taxes shall be paramount to every other lien or encumbrance. *Trustees of Public Schools v. Taylor*, 618
3. The charter of the city of Trenton, approved March 19th, 1874, makes taxes imposed on lands a lien paramount to prior judgments, mortgages and other encumbrances thereon. *Trustees &c. v. Trenton*, 667
4. The provisions of the city charter giving taxes priority over judgments, mortgages and other encumbrances on the

Trusts—Continued.

and income of it during his or her natural life, in such manner and in such amounts as the executors should deem most prudent." On a bill filed by the executors for the construction of this clause, and for directions as to their duty,—*Held*, that they must apply so much of the income of one of the children as will be sufficient to satisfy a judgment recovered against him, a receiver having been appointed under supplemental proceedings on the execution, and it appearing, by the bill, that of the income coming to the legatee the executors have enough money in their hands, over and above the amount which they deem it prudent to pay the legatee, to satisfy the judgment with costs and interest. *Hardenburgh v. Blair*,

42

4. The jurisdiction of the court of chancery to reach the property of a judgment debtor, held in trust for him, and apply it in satisfaction of a judgment at law, is defined and limited by the acts of 1845 and 1864 (*Rev.* p. 120, §§ 88-91). It does not extend to property held in trust for him or for his use, "where such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself." *Id.*,
- 645
5. These statutes should be liberally construed, so as to apply to such property as is enumerated in them, without regard to the means by which it came to the debtor—whether by gift, grant or devise—unless it be such property as is expressly excepted. Property reserved by law to the judgment debtor, and property and things in action held in trust for him, when such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself, are expressly excepted. *Id.*,
- 645
6. A legacy in the hands of an executor upon no other trust than to pay it over to the legatee, is not held in trust within the meaning of the exception in the statute. Such a legacy may be reached by a judgment creditor of the legatee, by proceedings under the statute. But where a fund is given to executors with directions to invest it and to pay to a legatee, during his life, the interest and income thereof, at such times, in such manner, and in such amounts as the executors shall deem prudent, there are present the essential qualities of a trust—confidence, discretion and active duties to be performed by the trustee—and the principal fund, and the

Trusts—Continued.

interest and income thereof, are held in trust within the meaning of the exception in the statute. Neither the principal fund nor the accumulations of interest which the executors have kept back from the legatee for life because they have not deemed it prudent to pay it over to him, can be reached in the court of chancery by a judgment creditor of the legatee for life, and be applied in payment of the judgment, under the statute. *Id.*, 645

7. A testator gave to his executors the sum of \$250,000 in trust, to be kept safely invested, and to pay to his son the interest and income of such sum, at such times, in such manner, and in such amounts as his executors should deem most prudent, for and during his natural life, and upon his death, leaving issue, then to hold the said sum of \$250,000 for the benefit of such issue, &c.—*Held*,

(1) That the legatee for life was entitled to the whole interest and income derived from the investment, during his life, subject to a reasonable discretion on the part of the executors as to the times, manner and amounts of the payments.

(2) That accumulations of interest which the executors had in hand, which they had not deemed it prudent to pay to the legatee for life, cannot be reached by his judgment creditors in satisfaction of their judgments, either at law, by supplementary proceedings under the act concerning executions (*Rev. p. 393*), or in equity, under the statute above referred to. *Id.*, 645

8. In construing the limitations of trusts, courts of equity adopt the rules of law applicable to legal estates. The rule in *Shelley's Case* is applicable to equitable as well as to legal estates. *Cushing v. Blake*, 689

9. In some cases, and for certain purposes, a court of equity, where the trust is what is known as an executory trust, will so deal with it as to give effect to the general intent of the creator of it, without adherence to the strict legal effect of the terms in which it is expressed. *Id.*, 689

10. The distinction between executed and executory trusts depends upon the manner in which the trust is declared. When the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust. It is only where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be

Trusts—Continued.

carried into effect substantially in the discretion of the trustee, that a court of equity regards the trust as an executory trust, and will direct the trust to be executed upon a construction different from that which the instrument would receive in a court of law. *Id.*, 689

11. A mere direction to the trustee to convey, will not convert a trust into an executory trust. If the trusts are fully and accurately expressed, the rights of the beneficiaries are not affected by the direction to convey; the conveyance must conform to their rights as declared, and the equitable estate immediately vests accordingly. *Id.*, 689

12. In one respect there is a difference between marriage articles and a devise by will. When technical terms are used in an agreement for a settlement, in view of marriage, which, under the artificial rule in *Shelly's Case*, would create an estate in fee or in tail, the court will infer, from the nature of the agreement, that the parties contemplated provision for the issue of the marriage, which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be executed in such a manner as will prevent the destruction of the limitations over to the issue. But this doctrine is applicable only so long as the agreement for a settlement remains a matter of contract. If the parties have themselves completed the settlement by a deed complete in itself, so that it requires only to be obeyed and fulfilled by the trustee according to the provisions of the settlement, the trust will be construed in the same manner as other trusts for the same purposes. *Id.*, 689

See LEGACY, 4-6; LIMITATIONS, 3; TENANTS IN COMMON; VARIANCE.

U.**Usury.**

1. Although, by the terms imposed upon a defendant who is let in to answer, he is prevented from setting up usury, yet, if usury be proved, the complainant will be allowed to recover only the amount equitably due upon his mortgage. *Powers v. Chaplain*, 17
2. One of two executors loaned moneys of the estate on bond and mortgage, reserving usury thereon and appropriating it to his own use. On foreclosure by the executors on behalf of the estate,—*Held*, that such usury could be set up as a defence. *O'Neil v. Cleveland*, 273

Usury—*Continued.*

3. The receipt by a mortgagee's attorney, to whom the mortgage was made (in fact for the mortgagee, but not so expressed in the instrument), of a sum of money from the mortgagor's agent, under an agreement between them subsequent to the loan, as *bona fide* compensation for examining the title to the premises mortgaged, which compensation was paid out of the loan, does not make the loan usurious. *Dayton v. Moore*, 543
4. A purchaser of an equity of redemption in lands covered by a usurious mortgage, who purchases subject to the lien of the mortgage, will not be allowed to set up usury against such mortgage. *Lee v. Stiger*, 610
5. The same rule applies to a purchaser at a judicial sale, when it appears that he purchased with an understanding that he should take the property subject to a prior usurious mortgage. *Id.*, 610

V.**Variance.**

1. A. conveyed land to B. The latter subsequently sold it to C. A., by his bill, alleged and sought to establish an express trust in his favor in the consideration money of the deed from B. to C. The proof failed.—*Held*, on the ground of variance, that he could not, under the bill, recover the money by proof that the conveyance from him to B. was merely voluntary. If the conveyance was merely voluntary, no resulting trust would arise therefrom. *Stucky v. Stucky*, 546

See ACCIDENT, 2; PLEADING, 2.

Vendor and Vendee.

1. An acknowledgment of the payment of the purchase-money in the body of the deed, or by a receipt, will not operate as a waiver or discharge of the vendor's lien, if the purchase-money has not, in fact, been paid. *Ogden v. Thornton*, 569
 2. As a general rule, the acceptance of a deed discharges the vendor from his covenant to convey, though the deed may not, in essential particulars, conform to the executory contract. *Rowley v. Flannelly*, 612
 3. But this rule will not be applied to a case where the vendee accepts a deed, conveying less than he is entitled to, under a mistake or through the fraud of the vendor. *Id.*, 612
- See* FRAUD, 1, 3; MORTGAGE, 11, 14, 15; SPECIFIC PERFORMANCE, 3; USURY, 3, 4.

W.

Waiver.

See MORTGAGE, 1; VENDOR, 1.

Waste.

See PARTITION, 4; RECEIVERS, 4.

Water Rights.

1. The right of every riparian owner to use the water flowing through his land for its proper irrigation, is subject to the limitation that his use for that purpose must be such as not essentially to interfere with the natural flow of the stream, or essentially and to the material injury of the proprietors below to diminish the quantity of water that goes to them. *Farrell v. Richards*,

511

See JURISDICTION, 1; QUIA TIMET, 2.

Wills.

1. The evidence of three out of four disinterested, subscribing witnesses to a will (the fourth being dead at the time of the trial), as to the testamentary capacity of a testator ninety-three years old,—*Held*, to outweigh that of ten other witnesses, all of whom were related to the testator, either by blood or affinity; the fact also appearing that the testator's attending physician, although subpoenaed by the caveators, and present at the trial, was not examined. *Sutton v. Morgan*,
2. The fact that a testatrix declared an instrument to be her last will, before she signed her name thereto, is a compliance with the statute which requires that a will be declared to be the last will of the person making it, in the presence of the witnesses. *Errickson v. Fields*,
3. The evidence in this case,—*Held*, to establish the testatrix's testamentary capacity, notwithstanding proof that she talked to herself, and seldom managed her own business matters. *Id.*,

629

634

634

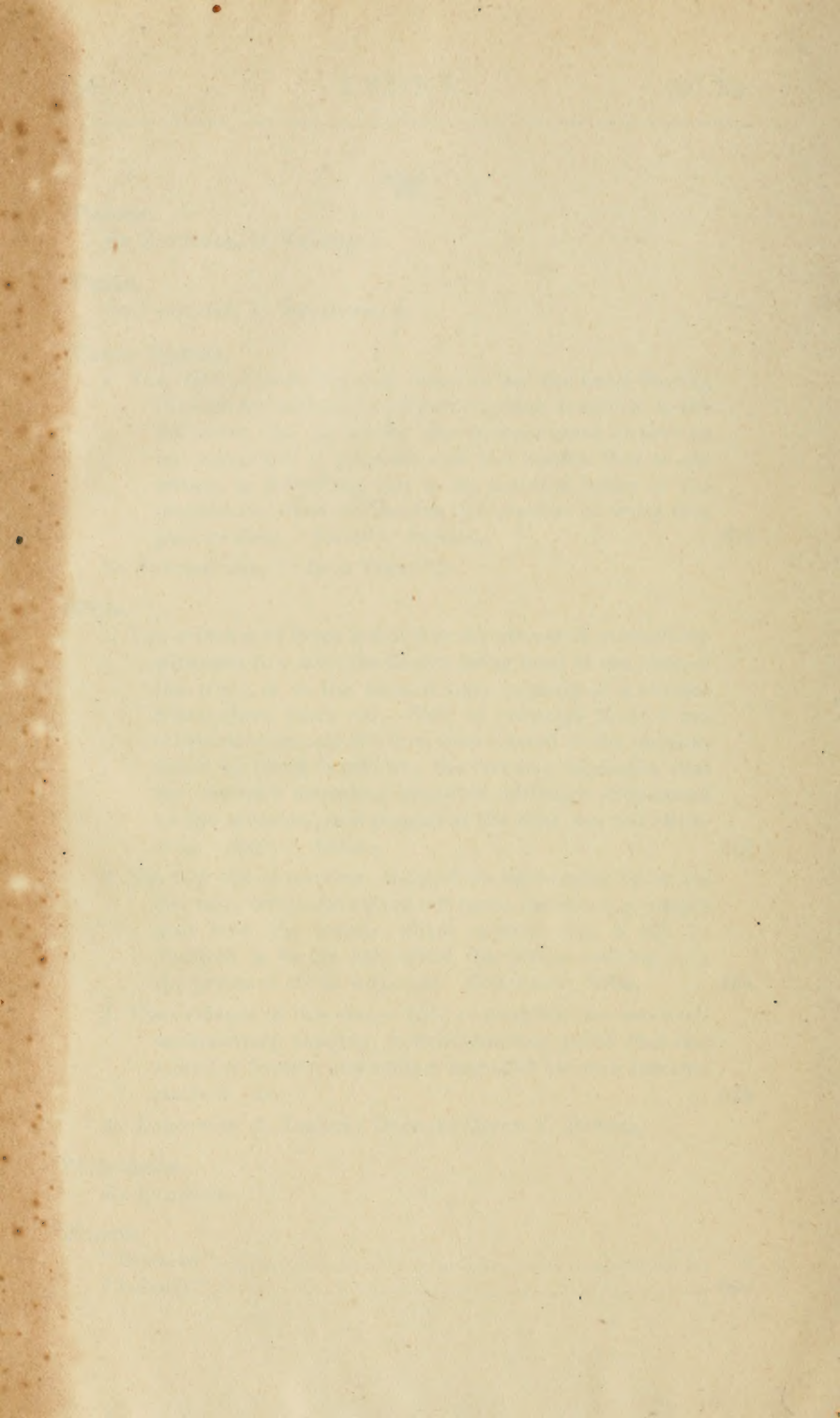
See EXECUTORS, 4; LEGACY; ORPHANS COURT, 1; POWERS.

Witnesses.

See EVIDENCE.

Words.

- | | |
|-----------------|-----|
| "Between" | 3 |
| "Laborer" | 590 |





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